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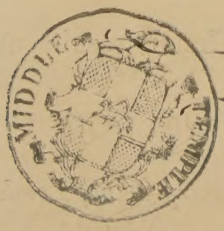
AT THE

FINAL AND HONORS EXAMINATIONS

OF THE LAW SOCIETY.

FOURTH EDITION

By ALBERT GIBSON and ARTHUR WELDON.



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PREFACE

TO THE FOURTH EDITION.

ALTHOUGH little more than two years have elapsed since the Third Edition of this Work was published, we have found many additions and alterations necessary in the present Edition.

We have in places somewhat altered the internal arrangement of the subjects, particularly in connection with Bills of Sale, Wills, and Powers of Appointment. We have enlarged our remarks on Stamp Duties, and added at the end of each subject a few comments on legal charges. The Trustee Act, 1893, the Married Women's Property Act, 1893, the Conveyancing Act, 1893, and other statutes passed since the last Edition, will be found duly incorporated in their proper places, and all decisions of importance up to the time of going to press have been noticed; indeed, we have included cases which have been decided during the time the work has been going through the press.

No effort on our part has been spared to make the book worthy of the patronage which has been so freely bestowed upon it, and we trust that it will continue to be useful alike to Student and Practitioner.

ALBERT GIBSON.
ARTHUR WELDON.

April, 1894.

PREFACE TO THE FIRST EDITION.

In the following pages we have endeavoured to supply a want which we feel exists among Law Students for a book dealing with the subject of the Law of Real Property in so far as it bears upon practical Conveyancing. There are, we admit, existing many books from which the Student can obtain the information he requires, but most of these are treatises which are written more particularly for practising lawyers, and which are increased in bulk and cost by precedents and forms (which in our experience the average Law Student seldom or never reads); while other books either devote a preponderating portion of their pages to the law on its theoretical side or historical side, or else aim at describing the functions which will attach to the embryo solicitor as matters of office routine. We have endeavoured to steer a mid-course between these; and while we have not given any forms or precedents of Conveyancing instruments, and have presupposed an acquaintance by the reader with the theory and history of the law, we have tried to miss no point of law which may arise in connection with any ordinary transaction in Conveyancing. Hoping thereby the better to command the attention of the Student and to attract his interest more powerfully to a dry and difficult subject, we have couched our language in the form of a familiar address to him.

With a view to making the book as inexpensive as possible, we have avoided giving in footnotes references to the cases cited, and instead have given a complete Table of Cases, with references to the various Reports, to which the reader can turn should he wish to refer to the report of any particular case. With regard to quite recent cases which have not been reported, we have occasionally given references to the "Law Notes" as being the most likely paper to be in the hands of those for whom these pages are most particularly intended, namely, candidates for the Intermediate and Final Examinations of the Law Society.

ALBERT GIBSON.
ROBERT McLEAN.

May, 1885.

TABLE OF CONTENTS.

PAGE

TABLE OF CASES - - - - - - - - - - - - xv

TABLE OF STATUTES - - - - - - - - - - - - lxvii

INTRODUCTION - - - - - - - - - - - - lxxiii

PART I.

VENDORS AND PURCHASERS - 1—205

CHAPTER I.

LEGAL DISABILITIES - - - - 1—25

I. Persons non compotes mentis - - - - - - - - 2
II. Infants - - - - - - - - - - - - - 3
III. Married women - - - - - - - - - - - - 6
IV. Aliens - - - - - - - - - - - - - 10
V. Traitors and felons - - - - - - - - - - 10
VI. Corporations - - - - - - - - - - - - 11
VII. Persons acting in a fiduciary capacity - - - - - - - 16
VIII. Promoters, &c. acting under the Lands Clauses Consolidation Act 21
IX. Limited owners of land - - - - - - - - - 24

CHAPTER II.

PAGE

THE PARTICULARS OF SALE - - - - - - - - 26—31

CHAPTER III.

THE CONDITIONS OF SALE - - - 32—59

I. Conditions relating to the auction - - - - - - - 38
II. Conditions relating to the abstract, &c. - - - - - 41
III. Conditions relating to the property sold, and its identity - - 47
IV. Conditions relating to compensation - - - - - - 48
V. Condition giving vendor right to resell - - - - - - 50
VI. Some special conditions - - - - - - - - - - 51

CHAPTER IV.

CONTRACT FOR SALE AND PURCHASE - - - 60—77

I. What is an interest in land within sect. 4 of Statute of Frauds - 61
II. The requisites of a valid contract - - - - - - - 62
III. What acts of part performance will take a case out of the statute - 64
IV. The effect of the contract on the position of the parties - - - 66

CHAPTER V.

THE ABSTRACT OF TITLE - - - 78—139

I. Points of law affecting the goodness or otherwise of the abstract - 82
II. Points of law relating to the evidence by which the title abstracted is proved - - - - - - - - - - - - 102

CHAPTER VI.

PAGE

SEARCHES FOR INCUMBRANCES - - 140—156

I. Usual searches - - - - - - - - - - - 141

II. Special searches - - - - - - - - - - - 151

III. Mode of searching - - - - - - - - - - 153

CHAPTER VII.

THE FORM AND CONTENTS OF AN ORDINARY PURCHASE DEED - 157—189

I. The date - - - - - - - - - - - - 157

II. The parties - - - - - - - - - - - - 157

III. Recitals - - - - - - - - - - - - 164

IV. The consideration - - - - - - - - - - 166

V. Operative words - - - - - - - - - - 169

VI. The parcels - - - - - - - - - - - 170

VII. General words - - - - - - - - - - 172

VIII. Exceptions and reservations - - - - - - - - 173

IX. The habendum - - - - - - - - - - 174

X. Covenants - - - - - - - - - - - 175

CHAPTER VIII.

THE COMPLETION OF THE PURCHASE - - 190—227

I. The execution of the deed - - - - - - - - - 190

II. The payment of the purchase-money - - - - - - 191

III. Some special formalities in connection with the parties conveying 195

IV. Steps to be taken subsequently to the execution of the conveyance 199

V. Some special conveyances - - - - - - - - 203

Conveyance of copyholds - - - - - 203—208

Assignment of leaseholds - - - - - 208—210

Assignments of choses in action - - - - 210—214

Assignments of policies of assurance - - - 214, 215

Assignments of goodwill - - - - - 215, 216

Grants of annuities - - - - - - 216—218

The assignment of patents - - - - - 218, 219

Assignments of copyright - - - - - - 219

Grant of an advowson - - - - - 220, 221

Grant of easements - - - - - - 221, 222

Conversion of leaseholds into freeholds - - 222, 224

Stamps - - - - - - - - - - - 224—226

Legal charges - - - - - - - - - 226, 227

Part II.

PAGE

MORTGAGORS AND MORTGAGEES 228—289

I. The value and nature of the proposed security - - 228

II. The title of the mortgagor - - - - - - - 238

III. The form and contents of an ordinary mortgage - - 239
Nature of a mortgage - - - - - - - - - 239
The covenant for repayment of the loan and interest - 240
The proviso for redemption, and herein of foreclosure - - 245
The covenants - - - - - - - - - 251
The power of sale - - - - - - - - - 254
The power to appoint a receiver - - - - - 258
The power to cut and sell timber - - - - - 260
The power to grant leases - - - - - - 261
The attornment clause - - - - - - - 263
Forms - - - - - - - - - - - 266

IV. The form of the mortgage in special cases - - - - 267
Mortgage of a life estate - - - - - - - 267
Mortgages of copyholds - - - - - - - 267
Mortgages of leaseholds - - - - - - - 268
Mortgages of reversions - - - - - - - 270
Mortgages of life policies - - - - - - 270
Statutory mortgages - - - - - - - - 271
Equitable mortgages - - - - - - - 273
Stamps - - - - - - - - - - 275
Legal charges - - - - - - - - - 275

V. Transfers of mortgages - - - - - - - - 277
The desirability of the mortgagor's concurrence in the transfer - - - - - - - - - 277
Transfer of mortgages of copyholds - - - - - 279
Parties to the transfer after death of the mortgagee - - 280
Legal charges - - - - - - - - - - 283

VI. Re-conveyance of mortgages - - - - - - 284
Legal charges - - - - - - - - - - 285

VII. Some miscellaneous matters - - - - - - 286
Powers and duties of mortgagors and mortgagees in possession - - - - - - - - - - 286
Stamps on mortgages, transfers, and re-conveyances - - 289

PART III.

PAGE

BILLS OF SALE - - - 291—322

I. WHAT IS A BILL OF SALE WITHIN THE ACTS? - - - - 292

II. WHAT ARE PERSONAL CHATTELS WITHIN THE ACTS? - - - 295

III. THE REQUISITES OF THE ACT OF 1878 AS TO THE EXECUTION AND ATTESTATION OF BILLS OF SALE - - - - - - 299

IV. THE REQUISITES OF THE ACT OF 1882 AS TO THE CONTENTS, EXECUTION AND ATTESTATION OF BILLS OF SALE - - - - 301

Table of some important cases decided under sect 9 of the Act of 1882 - - - - - - - - - - 306

V. THE PROVISIONS OF THE ACTS AS TO THE CONSIDERATION, REGISTRATION, AND RE-REGISTRATION OF A BILL OF SALE - - 309

The consideration - - - - - - - - - - 309

Registration - - - - - - - - - - - 311

Re-registration - - - - - - - - - - - 315

The result of omission to register and re-register - - 315

VI. WHAT AMOUNTS TO APPARENT POSSESSION, &c. UNDER ACT? - 316

VII. HOW FAR THE ORDER AND DISPOSITION OF THE BANKRUPTCY ACT IS AFFECTED BY REGISTRATION - - - - - - - 318

VIII. SOME MISCELLANEOUS MATTERS - - - - - - - - 319

Searches - - - - - - - - - - - 319

Entry of satisfaction - - - - - - - - - 320

The risks attending a bill of sale - - - - - 320

The statutory form - - - - - - - - - 321

Stamps, &c. - - - - - - - - - - 322

Legal charges - - - - - - - - - - 322

PART IV.

LESSORS AND LESSEES - 323—385

I. THE PARTIES TO A LEASE - - - - - - - - - 323

Leases by and to infants - - - - - - - - 324

Leases by and to persons non compotes mentis - - - 326

Leases by married women - - - - - - - - 326

Leases by copyholders - - - - - - - - 327

Leases by reversioners - - - - - - - - 327

LESSORS AND LESSEES—*continued.*

PAGE

I. THE PARTIES TO A LEASE—*continued.*
Leases by and to corporations - - - - - - 328
Leases by agents - - - - - - - - - 328
Leases by executors and administrators - - - - 329
Leases under powers - - - - - - - - 330
Leases under the Settled Estates Act, 1877, and the Settled Land Acts, 1882 to 1890 - - - - - - 331

II. THE FORM AND CONTENTS OF A LEASE - - - - - - 334
Contents of the lease - - - - - - - 336
Covenant to pay rent - - - - - - - - 346
Covenants to pay taxes, &c. - - - - - - 351
Covenant to repair - - - - - - - - 353
Covenant for insurance - - - - - - - 355
Restrictive covenants - - - - - - - 356
Covenants not to assign or underlease - - - - 359
Covenants by the lessor - - - - - - - 361
Conditions for re-entry and forfeiture - - - - 363

III. SOME MISCELLANEOUS MATTERS - - - - - - - 369
The effect of waiving a right to re-enter - - - - 369
The surrender of leases - - - - - - - 370
Notices to quit - - - - - - - - - 372
Rights of the parties on the expiration of the term - - 373
The provisions of the Ground Game Act, 1880 - - - 381
The liabilities incurred by a tenant who holds over - - 383
Stamps - - - - - - - - - - - 384
Legal charges - - - - - - - - - - 385

PART V.

SETTLEMENTS - - - 386—480

I. THE OBJECT OF A MARRIAGE SETTLEMENT - - - - - 386

II. SETTLEMENTS OF PERSONAL PROPERTY - - - - - - 392
How the trust property is vested in the trustees - - 392
The covenant to settle after-acquired property - - - 394
Provision for an immediate income - - - - - 396
Settlement of a life policy - - - - - - - 396
Settlements by infants - - - - - - - 397
Covenants for title - - - - - - - - - 399

SETTLEMENTS—*continued.*

PAGE

II. SETTLEMENTS OF PERSONAL PROPERTY—*continued.*
The trusts of the settlement - - - - - - 400
Trustee clauses - - - - - - - - - 407
III. STRICT SETTLEMENTS - - - - - - - - 423—470
Generally as to the form of a strict settlement - - - 424
The Settled Land Acts - - - - - - - 439
IV. VOLUNTARY SETTLEMENTS - - - - - - - 470
V. SOME MISCELLANEOUS MATTERS - - - - - - 479
Stamps - - - - - - - - - - 479
Legal charges for settlements - - - - - 480

PART VI.—WILLS - - 481—538

I. THE CONSTRUCTION OF A WILL - - - - - - - 481
General rules of construction - - - - - - 482
Construction of particular phrases - - - - - 484
II. THE CONTENTS OF A WILL - - - - - - - - 497
Clause of revocation - - - - - - - 497
The date of a will - - - - - - - - 497
The appointment of executors - - - - - - 499
The direction to pay debts - - - - - - - 500
What constitutes a charge of debts on the realty - - 500
The carrying on of the testator's trade or business - - 501
The bequest of legacies - - - - - - - 502
The various kinds of legacies - - - - - - 502
From what time legacies carry interest - - - - 505
Several legacies to the same person - - - - - 508
Gifts when vested and when contingent - - - - 508
Legacies upon condition - - - - - - - 512
Legacies to creditors, debtors, and others - - - 517
Provisions for the benefit of the testator's family - - - 518
Duties of executor with regard to wasting property - - 524
What property will be included in a general devise - - 527
The effect of a devise without words of limitation - - 528
The meaning of the words "Die without issue" - - - 529
The amount of the estate which trustees will take under various circumstances - - - - - - 530
When a lapse of a devise or bequest occurs - - - - 531
Appointment of guardians - - - - - - - 532
Undisposed-of residue - - - - - - - - 533
Letter of Law Society (legacy and succession duty) - - 534
III. THE EXECUTION OF A WILL - - - - - - - - 535

Part VII.

PAGE

Some Miscellaneous Subjects - 539—575

I. Partnership deeds - - - - - - - - - - 539
The Partnership Act, 1890 - - - - - - 546

II. Deeds of disclaimer - - - - - - - - - - 558

III. Deeds of release - - - - - - - - - - 560

IV. Disentailing assurances - - - - - - - - 561

V. Appointments under powers - - - - - - - 567
The different sorts of powers - - - - - - 567
As to who can exercise powers - - - - - 567
As to the revocation, &c. of appointments - - - 568
How the Perpetuity Rule applies to appointments under powers - - - - - - - - - 568
Defective appointments - - - - - - - 572
Illusory appointments - - - - - - - 572
Excessive and fraudulent appointments - - - 573
Release of powers - - - - - - - - 574

Part VIII.

Conveyancing Costs - - 576—592

INDEX - - - - - - - - - - - - - 593

TABLE OF CASES.

A.

PAGE

Abbot *v.* Middleton, 7 H. of L. Ca. 68, 114; 28 L. J. Ch. 113 483
Adam *v.* Adam, Cowp. 651 568
Adams *v.* Adams, 1 Ch. 329; 62 L. J. Ch. 266; 68 L. T. 376; 41 W. R. 329 405
Adams *v.* Linsell, 1 B. & A. 681 64
Adams *v.* Taunton, 5 Madd. 435 560
Adderly *v.* Dixon, 1 S. & S. 607 72
Agace, Ex parte, 2 Cox, 312 550
Agar *v.* Fairfax, 2 L. C. Eq. 451 86
Agar *v.* George, 2 C. D. 706; 34 L. T. 487; 24 W. R. 636 395
Aichison *v.* Gradwell, 10 T. L. R. 20 276
Aines (Ames) *v.* Higden, 69 L. T. 292 257
Aldridge *v.* Ferne, 17 Q. B. D. 212; 55 L. J. Q. B. 587; 34 W. R. 587.. 352
Alexander *v.* Alexander, Tud. L. Cases, 395 ..... 520, 570, 573
Alfreton's Trusts, Re, 52 L. J. Ch. 745 403
Alison *v.* Frisby, 61 L. T. 632; 38 W. R. 65 218
Allam, Ex parte, 14 Q. B. D. 43; 33 W. R. 231 311
Allen, Re, 35 W. R. 100 ..... 536, 537
Allen, Re, 2 Curt. 331, 490 587
Allen *v.* Allen, 2 D. & W. 307; 21 W. R. 842 594
Allen *v.* Jackson, 1 C. D. 399; 45 L. J. Ch. 310; 33 L. T. 713; 24 W. R. 306 513
Allen *v.* Knight, 5 Hare, 272 132
Allen *v.* Marten, 5 Jur. 239 158
Allen *v.* Richardson, 13 Ch. D. 524 50
Allen *v.* Thompson, 1 H. & N. 15; 25 L. J. Ex. 249; 2 Jur. 45 312
Allhausen *v.* Brooking, 26 C. D. 559; 53 L. J. Ch. 520; 51 L. T. 57.. 382
Alsopp *v.* Lord Oxford, 1 M. & K. 564 138
Alston *v.* Atlay, 6 N. & M. 686; 2 H. & N. 166 220
American Concentrated Meat Co. *v.* Hendry, 62 L. J. Q. B. 388; 68 L. T. 742; 9 T. 340, 445 350
Ames, Re, Harbin *v.* Darby, 28 Beav. 325 416
Ames *v.* Ames, (1893) 2 Ch. 479; 62 L. J. Ch. 685; 68 L. T. 787; 41 W. R. 505 445
Ancona *v.* Rogers, 1 Ex. D. 285; 46 L. J. Ex. 121; 35 L. T. 115; 24 W. R. 1000 ..... 317, 318

PAGE
Ancona *v.* Waddell, 10 C. D. 157; 48 L. J. Ch. 111; 40 L. T. 31; 27 W. R. 186 401
Anderson and Milner, Re, 63 L. T. 332; 39 W. R. 44; 45 C. D. 476; 59 L. J. Ch. 765 ..... 346, 363
Anderson *v.* Oppenheimer, 5 Q. B. D. 602; 49 L. J. Q. B. 456 362
Andrew *v.* Andrew, 8 De G. M. & G. 336 509
Andrew *v.* Hancock, 1 B. & B. 37 352
Andrews *v.* Andrews, Re D'Angibau, 15 C. D. 228; 49 L. J. Ch. 756; 43 L. T. 135; 28 W. R. 930 4
Ann (Onn) *v.* Fisher, 5 T. R. 504 308
Anson *v.* Lee, 4 Sim. 463 247
Anthony *v.* Anthony, (1893) 3 Ch. 498; 62 L. J. Ch. 1004; 69 L. T. 300; 41 W. R. 667 ..... 144, 505
Antrim (Marquis of) *v.* Duke of Buckingham, 1 Ab. Eq. 242 567
Antrobus *v.* Smith, 12 Ves. 39 478
Appleton *v.* Rowley, L. R. 8 Eq. 139 101
Arbib and Class's Contract, Re, (1891) 1 Ch. 601 ..... 4, 44
Archer *v.* Kelley, 1 D. & S. 300 395
Arden's Trusts, Re, W. N. (1890) 204 407
Arnold *v.* Brady (Blades), 10 Law Notes, 362 492
Arran *v.* Crisp, 12 Mod. 55 351
Ashby *v.* Jenner, 7 Law Notes, 238 183
Ashby *v.* Pulbrook, 35 W. R. 779; 56 L. J. Q. B. 376 351
Ashcroft, Re, Ex parte Todd, 19 Q. B. D. 186; 56 L. J. Q. B. 431; 35 W. R. 676; 57 L. T. 835 476
Ashford *v.* Cafe, 7 Sim. 641 568
Ashford *v.* Munn, 34 C. D. 391; 56 L. J. Ch. 451; 56 L. T. 86 17
Ashton *v.* Blackshaw, L. R. 9 Eq. 510 294
Ashworth *v.* Lord, 36 C. D. 545 289
Aspinall and Powell, Re, 60 L. T. 595 31
Astley *v.* Earl of Essex, L. R. 18 Eq. 290 513
Atherton, Re, W. N. (1891) 85 441
Atkins *v.* Hiscocks, 1 Atk. 500 511
Attenboro *v.* Thompson, 2 H. & N. 559; 27 L. J. Ex. 23; 6 W. R. 135 312
Att.-Gen. *v.* Day, 1 Ves. sen. 218 62
Att.-Gen. *v.* Gregory, Re Divers, S. J. (1890) 676 ..... 534, 537
Att.-Gen. *v.* Sands, Tud. L. Cases 99
Att.-Gen. *v.* Sitwell, 1 Y. & C. Ex. 559 171
Attre *v.* Hawe, 9 C. D. 337; 47 L. J. Ch. 863; 38 L. T. 733; 26 W. R. 871 495
Attwater *v.* Attwater, 18 Beav. 330 514
Auriol *v.* Mills 342
Austen *v.* Bowker (Bowker *v.* Austen), 13 L. N. 39 480
Austerberry *v.* Corporation of Oldham, 29 C. D. 750; 55 L. J. Ch. 633; 53 L. T. 543; 33 W. R. 807 ..... 177, 345
Austin *v.* Beddoe, 41 W. R. 719 ..... 210, 330
Avarne *v.* Brown, 14 Sim. 303 42
Avery *v.* Cheslyn, 3 A. & E. 75 374
Avis *v.* Newman, 41 C. D. 532; 58 L. J. 590; 60 L. T. 891; 37 W. R. 613 429

PAGE
Ayler, Re, L. R. 1 C. D. 282 486
Aylesbury (Marquis of), Re, and Lord Iveagh 439, 444, 450
Aylesford (Earl of) *v.* Morris, L. R. 8 Ch. Ap. 484 169

B.

Backhouse *v.* Charlton, 8 C. D. 444; 26 W. R. 504 .....250, 274
Bacon's Trusts, Re, 42 C. D. 559; 58 L. J. Ch. 823; 61 L. T. 458 403
Badcock *v.* Hunt, 13 Q. B. D. 145 351
Baddley *v.* Baddley, 9 C. D. 113; 48 L. J. Ch. 36; 38 L. T. 906; 26 W. R. 850 479
Baggs, Re, 13 Law Notes, 38 .....3, 326, 443
Bagnall *v.* Villier, 12 C. D. 812; 48 L. J. Ch. 695; 28 W. R. 242 287
Bailey, Re, 1 Curt. 914 500
Bailey *v.* Barnes, (1894) 1 Ch. 25; 69 L. T. 542; 42 W. R. 66..132, 135, 257
Bailey *v.* De Crespigny, L. R. 4 Q. B. 180; 38 L. J. Q. B. 98 360
Bailey *v.* Lloyd, 5 Russ. 330 528
Bain *v.* Fothergill, L. R. 7 H. L. 158; 43 L. J. Ex. 243; 31 L. T. 387 71
Baker *v.* Rodgers, Cro. Eliz. 788 220
Baker *v.* Sebright, 13 C. D. 179; 41 L. T. 614; 49 L. J. Ch. 65; 28 W. R. 177 429
Ballard *v.* Shutt, 15 C. D. 122 44
Balmanno *v.* Lumley, 1 V. & B. 224..... 56
Bandy *v.* Cartwright, 8 Ex. 913; 22 L. J. Ex. 285 339
Bank of Australia *v.* Flower, L. R. 1 P. C. 27 542
Bannerman *v.* Clark, 3 Drew. 632 44
Barber, Re, 34 C. D. 77; 56 L. J. Ch. 216; 55 L. T. 882; 35 W. R. 326 417
Barclay *v.* Paine (Raine), 1 S. & S. 449 35
Bardell *v.* Daykin, 3 T. R. 526 307
Barham *v.* Keene, 1 J. & H. 685 145
Baring *v.* Abingdon, (1892) 2 Ch. 374; 62 L. J. Ch. 105 173
Barker *v.* Barker, 2 Sim. 249 341
Barlow *v.* Teal, 15 Q. B. D. 501; 54 L. J. Q. B. 564 377
Barnaby *v.* Tassel, L. R. 11 Eq. 363 488
Barnes *v.* Dowling, 44 L. T. 809.....341, 429
Barnett, Ex parte, Re Tamplin, 59 L. J. Q. B. 194; 62 L. T. 264; 38 W. R. 351 302
Barnett *v.* Barnett, 29 Beav. 239 510
Barney *v.* Barney, (1892) 2 Ch. 265; 61 L. J. Ch. 585; 67 L. T. 23; 40 W. R. 637 502
Barnhart *v.* Greenshields, 9 Moo. P. C. 18 131
Barr *v.* Kingsford, 56 L. T. 861 .....303, 306
Barrow *v.* Barrow, 4 K. & J. 409 399
Barrow *v.* Isaacs, (1891) 1 Q. B. 417; 64 L. T. 686; 60 L. J. Q. B. 179; 39 W. R. 338 .....361, 364, 366
Batchelor *v.* Biggar, 60 L. T. 416 352
Batchelor *v.* Yates, 38 C. D. 112; 57 L. J. Ch. 697; 58 L. T. 47; 36 W. R. 563 296

PAGE

Bate *v.* Bate, 43 C. D. 600; 59 L. J. Ch. 277; 62 L. T. 559 500
Bates *v.* Johnson, 1 John. 304 235
Baxter, Ex parte, Vince, Re, (1892) 1 Q. B. 587 547
Bayley's Settlement, Re, 6 C. D. 592 433
Bayspool *v.* Collins, L. R. 6 Ch. Ap. 228; 40 L. J. Ch. 289; 22 L. T. 650; 18 W. R. 730 472
Beale *v.* Symonds, 16 Beav. 406 99
Beales *v.* Tennant, 6 Jur. 628; 29 L. J. Q. B. 188; 1 L. T. 295 312
Beavan *v.* Earl of Orford (Oxford), 6 De G. M. & G. 507 145
Beavan *v.* MacDonald, 10 Exch. 184 2
Beck, Re, 24 C. D. 608; 31 W. R. 910; 52 L. J. Ch. 815; 49 L. T. 95 ..... 581, 582, 587
Beckett *v.* Tower Assets Co., (1891) 1 Q. B. 638; 64 L. T. 497; 60 L. J. Q. B. 493; 39 W. R. 438 293
Bedingfield and Herring's Contracts, Re, (1893) 2 Ch. 332; 62 L. J. Ch. 430; 68 L. T. 634; 41 W. R. 413 ..... 17, 160
Beere *v.* Hutchinson-Hoffmister, 23 Beav. 103 574
Beioly *v.* Carter, L. R. 1 Ch. Ap. 230; 38 L. J. Ch. 283; 20 L. T. 381; 17 W. R. 300 467
Belcher *v.* Mackintosh, 2 M. & R. 186; 8 C. & P. 720 354
Belding *v.* Read, 34 L. J. Ex. 212; 11 Jur. 547; 13 L. T. 66; 13 W. R. 867 298
Belfour *v.* Watson, 1 T. R. 310 355
Bell *v.* Phyn, 7 Ves. 459 497
Bellamy *v.* Brickenden, 3 J. & H. 137 271
Bellamy *v.* Debenham, (1891) 1 Ch. 412; 63 L. T. 220; 60 L. J. Ch. 166; 39 W. R. 257 ..... 45, 64
Bellamy *v.* Metropolitan Board of Works, 24 C. D. 357; 53 L. J. Ch. 174; 49 L. T. 708 192
Belton's Estate, Re, L. R. 12 Eq. 553; 25 L. T. 404; 19 W. R. 1052 .. 247
Bence *v.* Gilpin, L. R. 3 Ex. 76; 37 L. J. Ex. 36; 17 L. T. 655; 16 W. R. 705 204
Bennet *v.* Bishop of Lincoln, 2 W. Bl. 1182 220
Bennet *v.* Sadler, 14 Ves. 526 357
Bennett *v.* Womack, 7 B. & C. 627 ..... 340, 345
Benson *v.* Lamb, 9 Beav. 902 158
Benyon *v.* Benyon, 17 Ves. 34 508
Berkeley's (Earl of) Will, Re, 10 Ch. 56; 23 W. R. 195; 44 L. J. Ch. 3; 29 L. T. 531 445
Berrige *v.* Ward, 10 C. B. N. S. 400; 30 L. J. C. P. 218; 7 Jur. 876 .. 171
Berry *v.* Berry, 3 Giff. 134 486
Berwick, Ex parte, Re Young, 43 L. T. 576; 29 W. R. 292 311
Bessell *v.* Landsberg, 7 Q. B. 638; 14 L. J. Q. B. 355 371
Betts, Re, 18 Ch. D. 127; 50 L. J. Ch. 832; 45 L. T. 290; 30 W. R. 38 . 264
Beyfus *to* Masters, Re, 39 C. D. 110; 59 L. T. 740; 37 W. R. 261 29
Bianchi *v.* Offord, 17 Q. B. D. 484 308
Bickerton *v.* Walker, 31 Ch. D. 151 277
Bidlake *v.* Arundel, 1 Ch. R. 50 108
Biggs *v.* Peacock, 20 C. D. 200; 52 L. J. Ch. 4; 47 L. T. 341; 31 W. R. 345 86

PAGE

Bignold, Re, 45 C. D. 496; 59 L. J. Ch. 737; 63 L. T. 542; 39 W. R. 184 506
Bills *v.* Tatham, (1891) 1 Ch. 82; 63 L. T. 752; 60 L. J. Ch. 111; 39 W. R. 113 211
Birch *v.* Dawson, 2 A. & E. 37; 4 N. & M. 22 374
Birch *v.* Wright, T. R. 387 261
Bird *v.* Baker, 1 El. & El. 12 337
Bird *v.* Davy, (1891) 1 Q. B. 29; 60 L. J. Q. B. 8; 39 W. R. 40 304
Bird *v.* Greville, 1 Cab. & Ell. 317 341
Birmingham District Land Co. *v.* Allday, (1893) 1 Ch. 342; 62 L. J. Ch. 90; 67 L. T. 850; 41 W. R. 189; 9 T. 31 185
Bishop *v.* Beale, 4 Law Notes, 37 ..... 303, 305
Bishop *v.* Taylor & Co. 64 L. T. 529; 60 L. J. Q. B. 556; 39 W. R. 542 ..... 346, 359
Bishop of St. Albans *v.* Battersby, 3 Q. B. D. 359; 47 L. J. Q. B. 571.. 358
Bishop of Winchester *v.* Payne, 11 Ves. 195 149
Bissell *v.* Bradford Tramways Co., Limited, W. N. (1893) 44; 9 T. 337.. 592
Blacklow *v.* Laws, 2 Hare, 40 41
Blades *v.* Arnold, 10 Law Notes, 362 498
Blaiberg *v.* Beckett, 18 Q. B. D. 96 308
Blair and Girling *v.* Corder, 19 Q. B. D. 516; 36 W. R. 109 587
Blankenstein *v.* Robertson, 24 Q. B. D. 543; 59 L. J. Q. B. 315; 61 L. T. 732 ..... 305, 307
Blisset *v.* Daniel, 10 Hare, 493 ..... 541, 552
Blount *v.* Harris, 4 Q. B. D. 603; 48 L. J. Q. B. 159; 46 L. T. 641; 27 W. R. 202 312
Blower, Re, 6 C. D. 351; 42 L. J. Ch. 24; 25 L. T. 181; 19 W. R. 666 489
Bloxam *v.* Favre, 9 P. D. 130 535
Blundell *v.* De Falcke, 57 L. J. Ch. 576; 58 L. T. 621 407
Blyth *v.* Dennett, 13 C. B. 138 373
Boase *v.* Jackson, 3 B. & B. 185 384
Boddington *v.* Clairat, 22 C. D. 597; 25 C. D. 685 485
Bodman *v.* Bodman, (1891) 3 Ch. 135; 40 W. R. 60 495
Boehm, Re, (1891) P. 247; 64 L. T. 806; 39 W. R. 576 ..... 483, 484
Bolanchi Chocolate Co., Re, Law Times (1890), 273 216
Bolland, Ex parte, Re Roper, 21 C. D. 543; 52 L. J. Ch. 113; 47 L. T. 488; 31 W. R. 102 ..... 300, 310
Bolton *v.* London School Board, 7 C. D. 766; 47 L. J. Ch. 461; 38 L. T. 277; 26 W. R. 549 ..... 104, 165
Bond *v.* Rosling, 1 B. & S. 371 334
Bond *v.* Simmons, 3 Atk. 20 214
Bonnewell *v.* Jenkins, 8 C. D. 70; 47 L. J. Ch. 758; 38 L. T. 587; 26 W. R. 294 63
Bonnor *v.* Lyons, 38 W. R. 541 ..... 6, 161
Booth *v.* Booth, 4 Ves. 399 571
Booth *v.* Boutflower, 9 Law Notes, 137 19
Boraston's Case, Tud. L. Cases, 809 509
Bostock *v.* Floyer, 35 Beav. 603; L. R. 1 Eq. 26 413
Bott *v.* Gibson (Gibson *v.* Bott), 7 Ves. 96 507

PAGE

Botthamley *v.* Sherson, L. R. 20 Eq. 304; 35 L. J. Ch. 589; 33 L. T. 150; 23 W. R. 848 503
Bouchette *v.* Attenborough, 3 T. L. R. 813 306
Boughton *v.* James, 1 Coll. 26; 1 H. L. C. 406 .....436, 524
Bourne *v.* Brandreth, 58 L. T. 437 494
Bourne *v.* Wall, 64 L. T. 530; 39 W. R. 516..... 307
Bousfield *v.* Hodges, 33 Beav. 90 135
Bowman *v.* Hyland, 8 C. D. 588; 47 L. J. Ch. 581; 39 L. T. 90; 26 W. R. 876 43
Bowman *v.* Taylor, 4 N. & M. 264; 2 A. & E. 278 164
Bowyer's Settled Estate, Re, W. N. (1892) 48; 8 T. 441..... 463
Boyd's Settled Estates, Re, 14 C. D. 626; 49 L. J. Ch. 808; 28 W. R. 754 ..... 230, 409
Boyd *v.* Allen, 24 C. D. 622; 53 L. J. Ch. 701; 48 L. T. 628; 31 W. R. 544 86
Boyes *v.* Cook, 14 C. D. 53; 49 L. J. Ch. 350; 42 L. T. 552; 28 W. R. 754 528
Boyle *v.* Bishop of Peterborough, 1 Ves. jun. 299..... 570
Brace *v.* Duke of Marlborough, 2 P. Wms. 493 .....234, 235
Bradley *v.* Peixoto, Tud. L. Cases, 968 513
Bradley *v.* Seed, W. N. (1894) 2 302
Bradshaw *v.* Huish, 43 C. D. 260; 59 L. J. Ch. 135; 62 L. T. 52; 38 W. R. 199 .....500, 517
Brall, Re, (1893) 2 Q. B. 381; 62 L. J. Q. B. 459; 69 L. T. 323; 41 W. R. 623 ..... 47, 55, 115, 476
Bramwell *v.* Lacy (Lang), 10 C. D. 691; 48 L. J. Ch. 339; 40 L. T. 361; 27 W. R. 463 357
Brandon *v.* Robinson, 18 Ves. 429 .....401, 516
Bransom *v.* Stannard, 41 L. T. 434; 28 W. R. 180 63
Branton *v.* Griffiths, L. R. 2 C. P. D. 212; 46 L. J. C. P. 408; 41 L. T. 434; 29 W. R. 313 293
Braunstein *v.* Lewis, 64 L. T. 265 .....6, 161
Bray *v.* Bree, 2 Cl. & F. 453 571
Bray *v.* Walker, (1892) 2 Q. B. 881 23
Braybrook *v.* Inskip, 8 Ves. 217 527
Braybrooke *v.* Att.-Gen., 5 H. & N. 488..... 118
Breton's Estate, Re, 17 C. D. 416; 50 L. J. Ch. 369; 44 L. T. 37; 29 W. R. 77..... 479
Brettel *v.* Williams, 4 Ex. 630 548
Brewer *v.* Brown, 28 C. D. 309; 54 L. J. Ch. 605 29
Brewer *v.* Squire, (1892) 2 Ch. 111; 61 L. J. Ch. 676; 66 L. T. 486; 40 W. R. 378 249
Brice *v.* Bannister, 3 Q. B. D. 569 211
Bridge *v.* Abbott, 3 B. C. C. C. 224 490
Bridger, Re, (1893) 1 Ch. 44; 67 L. T. 549; 42 W. R. 79; W. N. (1893) 198; 10 T. 153 16
Briggs and Spicer, Re, (1891) 2 Ch. 127; 64 L. T. 187; 60 L. J. Ch. 514; 39 W. R. 377 .....47, 55, 114, 167, 476
Briggs *v.* Pike, 61 L. J. Q. B. 418; 66 L. T. 637..... 307
Bright *v.* Campbell, 54 L. J. Ch. 1077; 53 L. T. 428 .....242, 289
Bristowe *v.* Warde, 2 Ves. 336 570
Britain *v.* Rossiter, 11 Q. B. D. 123; 40 L. T. 240 65

PAGE

British Investment Co. *v.* Cobbold, L. R. 19 Eq. 627; 42 L. J. Ch. 332; 32 L. T. 251; 23 W. R. 687 81
Broderick, Re, Ex parte Bretham, 18 Q. B. D. 766 273
Bromley *v.* Smith, 26 Beav. 644 169
Brompton Hospital *v.* Lewis, (1893) 1 Ch. 44; 42 W. R. 79 16
Brooke *v.* Pearson, 27 Beav. 181 401
Brookes *v.* Drysdale, 3 C. P. D. 52; 37 L. T. 47; 26 W. R. 331 ..345, 346
Brophy *v.* Bellamy, L. R. 8 Ch. Ap. 798; 43 L. J. Ch. 183; 29 L. T. 380 406
Brown, Re, 16 C. D. 61 514
Brown *v.* Cole, 14 Sim. 427 240
Brown *v.* Collins, 62 L. T. 566 449
Brown *v.* Gellatly, L. R. 2 Ch. Ap. 751 526
Brown *v.* London and County Advance Co., 5 Times, 199 313
Brown *v.* Mellersh (Mellersh *v.* Brown), 45 Ch. D. 225; 60 L. J. Ch. 43; 38 W. R. 732 242
Brown *v.* Metropolitan Life Assurance Society, 1 El. & El. 832 ....263, 265
Brown *v.* Nisbett, 1 Cox, 13 571
Brown *v.* Powell, 4 Bing. 230; 12 Moo. 459 347
Brown *v.* Quilter, Amb. 619; 2 Eden, 210 341
Brown *v.* Savage, 4 Drew. 635 212
Brown *v.* Stenson, 24 Beav. 631 43
Bruce *v.* Marquis of Aylesbury, (1893) A. C. 356; 52 L. J. Ch. 95; 67 L. T. 490; 41 W. R. 318 448
Brudenell *v.* Elwes, 1 East, 442; 7 Ves. 382 571
Bryant *v.* Birmingham, 44 C. D. 636 79
Brydges *v.* Lewis, 3 Q. B. 603; 2 G. & D. 763 342
Bubb *v.* Yelverton, L. R. 13 Eq. 131 491
Buchanan *v.* Poppleton, 4 C. B. N. S. 20 117
Buckland *v.* Pocknell, 13 Sim. 406 76
Buckle *v.* Fredericks, 44 C. D. 244 358
Buckley, Re, 22 C. D. 583; 52 L. J. Ch. 439; 48 L. T. 109; 31 W. R. 376 406
Bull *v.* Hutchins, 32 Beav. 615 149
Bullmore *v.* Wynter, 22 C. D. 619 485
Bullock *v.* Bullock, 56 L. J. Ch. 221; 55 L. T. 703 413
Bullock *v.* Dommitt, 6 T. R. 650 355
Bulmer *v.* Hunter, L. R. 8 Eq. 46; 38 L. J. Ch. 543; 20 L. T. 942 .. 472
Bulwer Lytton's Will, Re, 38 C. D. 20; 57 L. J. Ch. 340; 36 W. R. 420 461
Burdett, Ex parte, Re Byrne, 20 Q. B. D. 310; 57 L. J. Q. B. 263; 58 L. T. 708; 36 W. R. 128 264
Burgess *v.* Vinicome, 34 C. D. 77; 56 L. J. Ch. 216; 55 L. T. 882; 35 W. R. 326 417
Burgess *v.* Wheate, 1 Eden, 195 99
Burlinson *v.* Hall, 12 Q. B. D. 347; 53 L. J. Q. B. 222; 50 L. T. 723; 32 W. R. 492 211
Burnett *v.* Lynch, 5 B. & C. 609; 8 D. & R. 386 244
Burrough's Trusts, Re, 10 L. T. 184 485
Burroughes, Re, 5 C. D. 601; 46 L. J. Ch. 528; 36 L. T. 778 155

PAGE

Burt v. Gray, (1891) 2 Q. B. 98; 65 L. T. 229; 39 W. R. 429; 60 L. J. Q. B. 664 ..... 269, 367
Burt v. Truman, 22 L. J. Ch. 902 233
Burton v. Neville, 2 Cox, 242 ..... 137, 138
Butcher v. Butcher, 14 Beav. 222 395
Butcher v. Jackson, 14 Sim. 444 574
Butler v. Lowe, 10 Sim. 317 488
Button v. O'Neil, 4 C. P. D. 354; 48 L. J. C. P. 368; 40 L. T. 799; 27 W. R. 592 312
Byram v. Tull, 42 C. D. 306; 38 W. R. 91 485
Byng's Settlement, Re, (1892) 2 Ch. 219; 61 L. J. Ch. 511; 66 L. T. 754; 40 W. R. 457 457

C.

Cadell v. Palmer, Tudor Con. Cases, 424 569
Cadogan, Re, 25 C. D. 154; 53 L. J. Ch. 207; 49 L. T. 666; 32 W. R. 57 493
Caine, Ex parte, 10 Q. B. D. 284; 52 L. J. Q. B. 354; 48 L. T. 357..8, 158
Caldwell v. Cresswell, L. R. 6 Ch. Ap. 278 512
Callow v. Callow, 42 C. D. 559; 58 L. J. Ch. 698; 38 W. R. 104 493
Calvert v. Thomas and Lloyd, 19 Q. B. D. 204; 56 L. J. Q. B. 470; 57 L. T. 441; 35 W. R. 616 307
Cameron and Wells, Re, 37 C. D. 32; 57 L. J. Ch. 69; 57 L. T. 645..390, 471
Campbell's Policies, Re, 6 C. D. 686; 46 L. J. Ch. 686; 25 W. R. 268.. 396
Cann v. Cann, 51 L. T. 770 413
Cannan v. Hartley, 9 C. B. 634 371
Capper v. Terrington, 1 Coll. 103 393
Cardigan v. Curzon-Howe, 30 C. D. 629; 55 L. J. Ch. 71; 53 L. T. 704; 33 W. R. 836 ..... 444, 448, 457
Carpenter v. Parker, 3 C. B. N. S. 206 362
Cartan v. Bury, 10 Ir. Ch. Rep. 892 75
Carter v. Wake, 4 C. D. 606; 46 L. J. Ch. 841 250
Carter v. Wilson 133
Cartwright, Re, Avis v. Newman, 41 C. D. 532; 58 L. J. Ch. 590; 60 L. T. 891; 37 W. R. 613 429
Casborne v. Scarfe, 1 Atk. 603 ..... 101, 240
Casement v. Fulton, 5 Moo. P. C. 139 537
Casern v. Dade, 1 Bro. Ch. 99 537
Casson v. Church, 53 L. J. Q. B. 335; 50 L. T. 568 301
Casson v. Churchley, Izard, Ex parte, 23 Ch. D. 409; 52 L. J. Ch. 802; 49 L. T. 230; 32 W. R. 218 ..... 295, 299
Castellain v. Preston, 11 Q. B. D. 380; 52 L. J. Q. B. 366; 49 L. T. 29; 30 W. R. 597 ..... 36, 67
Castigan v. Hastler 159
Castle v. Downton, 5 C. P. D. 56; 49 L. J. C. P. 6; 41 L. T. 528; 28 W. R. 257 313
Castle v. Fox, L. R. 11 Eq. 542; 40 L. J. Ch. 302; 24 L. T. 536; 19 W. R. 840 498

PAGE
Cater's Trusts, Re, 25 Beav. 361 561
Catling *v.* King, 5 C. D. 660; 49 L. J. Ch. 384; 36 L. T. 526; 25 W. R. 550 40
Cato *v.* Thompson, 9 Q. B. D. 16.. 57
Catt *v.* Tourle, L. R. 4 Ch. Ap. 654; 38 L. J. Ch. 665; 20 L. T. 551; 17 W. R. 662 358
Cattell *v.* Corral, 4 Y. & C. 228 78
Cattly *v.* Simpson, 33 Beav. 551 248
Cave *v.* Cave, L. R. 15 Ch. D. 639 134
Cave *v.* Smith, 5 Law Notes, 235 365
Central Bank *v.* Hawkins, 62 L. T. 901 312
Chadwick *v.* Dolman, 2 Vern. 527 570
Chadwick *v.* Turner, 34 Beav. 634 142
Challinor, Ex parte, 16 C. D. 260; 44 L. T. 122; 29 W. R. 205 310
Chamberlain *v.* Lee, 10 Sim. 450 ..... 66, 79
Chambers' (Walker's) Settled Estates, Re, W. N. (1893) 170 452
Chancellor, Re, 26 C. D. 42; 53 L. J. Ch. 443; 51 L. T. 33; 32 W. R. 465 ..... 501, 525
Chancey's Case, 1 P. W. 208 517
Chaplin *v.* Southgate, 10 Mod. 384 361
Chapman *v.* Hebbs, 29 C. D. 1007; 54 L. J. Ch. 810; 52 L. T. 805; 33 W. R. 703 224
Chapman *v.* Knight, 5 C. P. D. 308; 49 L. J. C. P. 425; 42 L. T. 538; 28 W. R. 919 293
Chapman *v.* Reynolds, 28 Beav. 221 493
Charing Cross Bank, Ex parte, Re Parker, 16 C. D. 35; 50 L. J. Ch. 157; 44 L. T. 113; 29 W. R. 204 309
Charter *v.* Charter, L. R. 7 H. L. 364 482
Chesterfield *v.* Jansen, 1 L. C. Eq. 624 168
Cheston *v.* Powell, W. N. (1884) 67 341
Chesworth *v.* Hunt, 5 C. P. D. 266; 49 L. J. C. P. 507; 42 L. T. 774; 28 W. R. 815 237
Christian *v.* Devereux, 12 Sim. 264 491
Christian *v.* Whittaker, 34 C. D. 227; 56 L. J. Ch. 251; 56 L. T. 34; 35 W. R. 217 ..... 391, 395
Christopherson *v.* Naylor, 1 Mer. 326 521
Church *v.* Brown, 15 Ves. 65 ..... 346, 359
Church *v.* Gage (Sage), 67 L. T. 800; 41 W. R. 175 294
Churton *v.* Douglas, 1 John. 174 215
Clapham *v.* Andrews, 53 L. J. Ch. 792; 51 L. T. 86 237
Clark (Clack) *v.* Carlon, 7 Jur. N. S. 441 417
Clark *v.* Parker, 30 Beav. 54 277
Clark *v.* Ramuz, (1892) 2 Q. B. 456; 60 L. J. Q. B. 679; 65 L. T. 657.. 66
Clarke's Estate, Re, 1 S. & T. 22 527
Clarke, Re, 3 De G. J. & S. 14 486
Clarke *v.* Chamberlain, 16 C. D. 176; 29 W. R. 419 564
Clarke *v.* Clarke, 8 Sim. 59 487
Clarke *v.* Pannell, 4 Law Notes, 37 249
Clarke *v.* Willott, L. R. 7 Ex. 313; 41 L. J. Ex. 197; 21 W. R. 73 .. 167
Clarke *v.* Wright, 1 Atk. 12 471

PAGE

Clarkson *v.* Henderson, 14 C. D. 348; 49 L. J. Ch. 289; 43 L. T. 29; 28 W. R. 907 242
Clarkson *v.* Woodhouse, 5 T. R. 412 116
Clay *v.* Clay, 33 W. R. 516 491
Clay *v.* Southern, 7 Ex. 717 329
Clay *v.* Tetley, 16 C. D. 3; 50 L. J. Ch. 164; 43 L. T. 402; 29 W. R. 5 16, 17
Clayton's Case, 1 Mer. 572 337
Clayton *v.* Illingworth, 10 Hare, 501 ..... 72, 336
Clayton *v.* Leech, 41 C. D. 103; 61 L. T. 69; 37 W. R. 663 ..... 31, 49
Clayton *v.* Lord Wilton, 3 Madd. 302 472
Cleather *v.* Twisden, 24 C. D. 731; 53 L. J. Ch. 365; 49 L. T. 633 .. 549
Cleaver, Re, Rawlings, Ex parte, 18 Q. B. D. 489; 56 L. J. Q. B. 197; 56 L. T. 593; 35 W. R. 281 ..... 306, 307
Clegg *v.* Hands, 44 C. D. 503; 59 L. J. Ch. 477; 62 L. T. 502; 38 W. R. 433 358
Clements *v.* Wells, L. R. 1 Eq. 200; 35 L. J. Ch. 265; 14 W. R. 187.. 345
Clemson *v.* Townsend, 2 Cab. & Ell. 254 ..... 303, 305
Clergy Orphan Corporation, Re, L. R. 18 Eq. 280 412
Climie *v.* Wood, L. R. 3 Ex. 328; 37 L. J. Ex. 158; 18 L. T. 609 374
Climson *v.* Coles, 23 Q. B. D. 465; 58 L. J. Q. B. 346; 61 L. T. 116; 38 W. R. 110 237
Clinan *v.* Cooke, 1 S. & L. 41 65
Close, Ex parte, Re Hall, 14 Q. B. D. 386; 54 L. J. Q. B. 43; 33 W. R. 228; 51 L. T. 795 294
Clowes, Re, (1893) 1 Ch. 214; 68 L. T. 395; 41 W. R. 69 498
Coard *v.* Henderson (Holderness), 20 Beav. 147 492
Coatsworth *v.* Johnson, 55 L. J. Q. B. 220; 54 L. T. 520 366
Cochrane *v.* Entwistle, 25 Q. B. D. 116; 59 L. J. Q. B. 418; 62 L. T. 852; 38 W. R. 587 ..... 264, 295, 308, 355
Cock, Re, Ex parte Shilston, 57 L. J. Q. B. 169 270
Cohen *v.* Higgins, 8 T. L. R. 8 304
Cockerell *v.* Barber, 2 Russ. 585 491
Cole *v.* Scott, 19 L. J. Ch. 63; 1 M. & G. 518 498
Collen *v.* Wright, 7 E. & B. 301 329
Collinge's Settlement, Re, 36 C. D. 516 ..... 440, 450
Collins *v.* Castle, 36 C. D. 643 184
Collins *v.* Collins, 2 M. & K. 703 493
Collins *v.* Tuffley, (1893) P. 1; 62 L. J. Ch. 26; 67 L. T. 624; 41 W. R. 287 497
Collyer *v.* Isaacs, 19 C. D. 342; 51 L. J. Ch. 14; 45 L. T. 567; 30 W. R. 70 298
Columbine *v.* Penhall, 1 Sm. & G. 222 472
Commissioners *v.* Glasgow & S. W. R. Co., 5 Ap. Ca. 315 225
Compton *v.* Bayley, (1892) 1 Ch. 313; 61 L. J. Ch. 113; 65 L. T. 706.. 42
Congreve *v.* Evetts, 10 Ex. Reps. 298 298
Conolly *v.* Steer, 7 Q. B. D. 520; 50 L. J. Q. B. 326; 29 W. R. 529; 45 L. T. 502 301
Consolidated Investment Co *v.* Riley, 1 Giff. 371 271
Cook *v.* Taylor, 3 Times Reps. 800 306

PAGE
Cooke *v.* Benbow, 3 De G. J. & S. 1 543
Cooke *v.* Soltau, 2 Sim & Stu. 154 ..... 108, 126
Coombe, Re, Carter *v.* Coombe, 36 C. D. 348; 56 L. J. Ch. 981 298
Coombes *v.* Wilkes, 65 L. T. 56 63
Cooper, Ex parte, Re Pennington, W. N. (1888), p. 205 156
Cooper, Re, 4 C. D. 816; 46 L. J. Ch. 133; 35 L. T. 890; 25 W. R. 301 .. 37
Cooper *v.* Higgins, 34 S. J. 96 307
Cooper *v.* Macdonald, 7 C. D. 288; 47 L. J. Ch. 373; 38 L. T. 191; 26 W. R. 377 ..... 10, 565
Cooper *v.* Stephenson, 21 L. J. Q. B. 292 152
Cooper *v.* Wyatt, 5 Madd. 482 516
Copley *v.* Day, 13 East, 241 384
Coppin *v.* Fernyhough, 2 Br. C. C. 291 ..... 129, 133
Corbishley's Trusts, Re, 14 C. D. 846 109
Corbyn *v.* French, 4 Ves. 418 521
Corder *v.* Drakeford, 3 Taunton, 382 384
Corder *v.* Morgan, 18 Ves. 418 158
Cordingley *v.* Cheesborough, 4 D. F. & J. 379 50
Corporation of Bristol *v.* Westcott, 12 C. D. 461; 41 L. T. 21; 18 W. R. 547 360
Corporation of London *v.* Riggs, 13 C. D. 798; 49 L. J. Ch. 297; 42 L. T. 580; 28 W. R. 610 ..... 123, 221
Corsellis, Re, 34 C. D. 675; 35 W. R. 309; 56 L. J. Ch. 294; 56 L. T. 411 416
Cosser *v.* Dollinge, 3 M. & K. 283 346
Cotesworth *v.* Spokes, 10 C. B. N. S. 103 370
Coton, Re, Ex parte Payne, 35 W. R. 476; 56 L. T. 571 404
Cotton, Ex parte, 11 Q. B. D. 301; 49 L. T. 52; 32 W. R. 58 ....295, 303
Cottrell *v.* Cottrell, L. R. 2 P. & M. 397; 41 L. J. P. 57; 26 L. T. 527; 20 W. R. 590 ..... 161, 463
Coulson *v.* Dickson, 20 Q. B. D. 249; 57 L. J. Q. B. 149; 36 W. R. 142; 58 L. T. 119 304
Counsel *v.* L. & W. Discount Co., 19 Q. B. D. 512; 56 L. J. Q. B. 622; 36 W. R. 53 308
Cousins, Re, 31 C. D. 671 ..... 132, 134, 135
Coventry *v.* Coventry, 32 Beav. 612 395
Cowbridge Rail. Co. *v.* Guest, L. R. 6 Eq. 619 145
Cowburn *v.* Edwards, 16 Ch. D. 393 258
Coxhead's Case, Re, 1 Cruise, Dig. 2, 538 148
Coxon *v.* Rowland, W. N. (1894) p. 188 499
Cradoch *v.* The Scottish Provident Institution, 63 L. J. Ch. 15; 69 L. T. 380; W. N. (1893) 146 273
Cradock *v.* Piper, 1 M. & G. 664 416
Cradock *v.* Rogers, 53 L. J. Ch. 968; 51 L. T. 191 258
Crawcour *v.* Salter, 18 C. D. 30; 45 L. T. 62 293
Crawford *v.* Crawford, 2 Drew. 230 491
Crawford *v.* Newton, S. J. (1885) p. 672 354
Crawford *v.* Toogood, 13 C. D. 153; 49 L. J. Ch. 108; 41 L. T. 549; 28 W. R. 248 42
Crawley *v.* Price, L. R. 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874 363

PAGE

Credit Co. *v.* Pott, 6 Q. B. D. 295; 50 L. J. Ex. 106; 44 L. T. 506; 29 W. R. 326 311
Cresswell and Davidson, Re, 56 L. T. 811 ..... 366, 367, 368
Crewe *v.* Dickens, 4 Ves. 97 559
Croft *v.* Graham, 2 De G. J. & S. 155 169
Croft *v.* Lumley, 5 E. & B. 602 364
Crossley *v.* Elworthy, L. R. 12 Eq. 158; 40 L. J. Ch. 480; 24 L. T. 607; 19 W. R. 842 475
Crossley *v.* Maycock, L. R. 18 Eq. 181; 43 L. J. Ch. 379; 22 W. R. 387 63
Crosthwaite *v.* Dean, W. N. (1879) p. 93 496
Crowder *v.* Stone, 3 Russ. 217 523
Croxton *v.* May, L. R. 9 Eq. 404; 39 L. J. Ch. 155; 22 L. T. 59; 18 W. R. 373 109
Crozier *v.* Crozier, 3 D. & W. 353 571
Crump *v.* Temple, 7 Times Rep. 120 ..... 72, 335, 348
Cumberledge *v.* Cumberledge, 45 C. D. 269; 59 L. J. Ch. 717; 63 L. T. 52; 38 W. R. 767 490
Cumming *v.* Bedborough, 15 M. & W. 438 347
Cumming to Sodbolt (Godbolt), W. N. (1884) p. 204 47
Cummins *v.* Fletcher, 14 C. D. 699; 49 L. J. Ch. 563; 42 L. T. 859; 28 W. R. 772 236
Cunningham & Co., Re, 28 C. D. 682; 33 W. R. 387 294
Cunnyngham *v.* Thurlow, 1 R. & M. 436 574
Curling *v.* Austin, 2 D. & S. 129 48

D.

Dalrymple *v.* Hall, 16 C. D. 715 407
Dames and Wood, Re, 29 C. D. 626; 54 L. J. Ch. 771; 53 L. T. 177; 33 W. R. 685 43
Danby (Dainby) *v.* Platt, 61 L. J. Ch. 415; 40 W. R. 475 486
Dance *v.* Goldingham, 8 C. D. 902; 42 L. J. Ch. 777; 29 L. T. 166; 21 W. R. 761 ..... 37, 38
D'Angibau, Re, 15 C. D. 228; 49 L. J. Ch. 756; 43 L. T. 135; 28 W. R. 930 ..... 4, 92, 398, 568
Daniel *v.* Daniel, 61 L. T. 365 494
Darby (Darley) *v.* Tennant, 53 L. T. 257 348
Dashwood *v.* Magniac, 64 L. T. 99; 60 L. J. Ch. 210 428
David *v.* Sabin, (1893) 1 Ch. 523; 62 L. J. Ch. 347; 68 L. T. 237; 41 W. R. 398 ..... 179, 181
Davies, Re, 3 Curt. 748 537
Davies *v.* Davies, 4 Giff. 417 ..... 216, 541
Davies *v.* Hetherington, 62 L. T. 753 497
Davies *v.* Jones, 7 L. T. 130; 10 W. R. 779 318
Davies *v.* Keen (Rees), 17 Q. B. D. 408 316
Davies *v.* Rees, 17 Q. B. D. 408 ..... 304, 321
Davies *v.* Usher, 12 Q. B. D. 490; 53 L. J. Q. B. 422; 32 W. R. 832.. 305
Davies' Policy Trusts, Re, (1892) 1 Ch. 90; 61 L. J. Ch. 650; 66 L. T. 104 389

PAGE
Davis *v.* Burton, 11 Q. B. D. 537; 52 L. J. Q. B. 636 305
Davis *v.* Goodman, 5 C. P. D. 128; 49 L. J. C. P. 344; 42 L. T. 288; 28 W. R. 559 ..... 300, 304, 311, 315
Davis *v.* Lord Dysart, 20 Beav. 405 137
Davis *v.* Sear, L. R. 7 Eq. 427; 38 L. J. Ch. 545; 50 L. T. 56; 17 W. R. 390 174
Davison *v.* Grant, 1 H. & N. 744 371
Daw *v.* Terrel, 33 Beav. 218 273
Dawes *v.* Creyke, 30 C. D. 500; 54 L. J. Q. B. 1096; 53 L. T. 292; 33 W. R. 869 396
Dawes *v.* Treadwell, 18 C. D. 354; 45 L. T. 118; 29 W. R. 793 395
Dawson *v.* Hearn, 1 R. & M. 606 515
Dawson *v.* Linton, 5 B. & A. 521 352
Dawson *v.* Small, L. R. 18 Eq. 114; 43 L. J. Ch. 406; 30 L. T. 252; 22 W. R. 514 530
Deakin *v.* Lakin, 30 C. D. 169; 55 L. J. 44; 53 L. T. 145; 33 W. R. 744 ..... 6, 389
Deakin and Pursell's Contracts, W. N. (1893), 152 324
Dean *v.* Carpenter, 23 Q. B. D. 566; 61 L. T. 860 302
Dean *v.* Godson, L. R. 3 Eq. 713 494
Dearle *v.* Hall, 3 Russ. 1 211
De Caux *v.* Skipper, 31 C. D. 635; 54 L. T. 481 237
Denby *v.* More, 1 B. & A. 123 352
Dennett *v.* Atherton, L. R. 7 Q. B. 316; 33 L. J. Ch. 134; 41 L. J. Q. B. 165; 20 W. R. 442 362
Dennis *v.* Lievre (Le Lievre, and Dennis *v.* Gould), (1893) 1 Q. B. 491; 62 L. J. Q. B. 353; 68 L. T. 626; 41 W. R. 468 238
Depree *v.* Bedborough, 4 Giff. 479 50
Derry *v.* Peek, 14 Ap. Ca. 337 238
De Tessier's Trusts, (1893) 1 Ch. 153; 62 L. J. Ch. 552; 68 L. T. 275; 41 W. R. 184 457
Dewar *v.* Brooke, 29 S. J. 273 413
D'Eyncourt *v.* Gregory, L. R. 3 Eq. 382; 36 L. J. Ch. 107; 15 W. R. 186 374
Dibb *v.* Walker, (1893) 2 Ch. 429; 62 L. J. Ch. 536; 68 L. T. 610; 41 W. R. 427 210
Dibble *v.* Bowater, 2 E. & B. 564 346
Dickenson *v.* Dodds, 2 C. D. 463; 45 L. J. Ch. 777; 34 L. T. 607; 24 W. R. 594 64
Dickenson *v.* Wright, 5 H. & N. 401 471
Dickin *v.* Dickin, 30 W. R. 887 56
Dickinson *v.* Dillwyn, 8 Eq. 546 396
Dickson, Re, Hill *v.* Grant, 28 C. D. 261; 51 L. T. 891; 33 W. R. 334 .. 405
Dimes *v.* Scott, 4 Russ. 195 526
Divers, Re, Sol. Journ. (1890) 676 537
Dixon *v.* Muckleston, 26 L. T. 752; 20 W. R. 619 273
Dobbin's Settlement, Re, 57 L. T. 277 314
Dobson *v.* Land, 4 De G. & S. 575 393
Dockwra *v.* Faith, 22 C. D. 693; 54 L. J. 112; 53 L. T. 288; 33 W. R. 574 ..... 20, 195

PAGE

Dodd *v.* Acklom, 6 M. & G. 676 371
Doe d. Calkin *v.* Tomlinson, 2 M. & S. 165 568
Doe d. Hiscocks *v.* Hiscocks, Tudor's Con. Cas. 483, 484
Doe d. Manifold *v.* Diamond, 4 B. & C. 243; 6 D. & R. 328 224
Doe *v.* Allen, 3 Taunt. 78 358
Doe *v.* Beavan, 3 M. & S. 353 360
Doe *v.* Bird, 2 A. & E. 161 357
Doe *v.* Bliss. 4 Taunt. 735 370
Doe *v.* Bousfield, 14 L. J. Q. B. 42 327
Doe *v.* Carter, 9 Q. B. 865 ..... 334, 360
Doe *v.* Deakin, 8 B. & C. 22 117
Doe *v.* Dixon, 9 East, 15 338
Doe *v.* Gladwin, 6 Q. B. 953 356
Doe *v.* Green, 9 A. & E. 658 338
Doe *v.* Guest, 15 M. & W. 160 357
Doe *v.* Hawke, 2 East, 481 357
Doe *v.* Hayes, 7 Taunt. 217 330
Doe *v.* Howard, 11 East, 498 372
Doe *v.* Jackson, 2 Stark. 293 373
Doe *v.* Laming, 4 Camp. 77 360
Doe *v.* Lea, 11 East, 312 373
Doe *v.* Lock, 2 A. & E. 743 338
Doe *v.* Marchetti, 1 B. & A. 715 364
Doe *v.* Peck, 1 B. & A. 428 370
Doe *v.* Phillips, 2 Bing. 13 363
Doe *v.* Sandham, 7 T. R. 705 346
Doe *v.* Stapleton, 3 C. & P. 275 372
Doe *v.* Topfield, 11 East, 246 492
Doe *v.* Waterton, 3 B. & A. 149 108
Doe *v.* Wooley, 8 B. & C. 22 110
Doe *v.* Worsley, 1 Camp. 20 360
Doe *v.* Wrightman, 4 Esp. 6 372
Dommett *v.* Bedford, 3 Ves. 149 401
Donaldson, Re, 27 C. D. 544; 51 L. T. 622 417
Donne *v.* Hart, 2 R. & M. 363 9
Dorin *v.* Dorin, L. R. 7 H. L. 568; 43 L. J. Ch. 462; 23 W. R. 253.. 485
Douglas *v.* Andrews, 14 Beav. 347; 19 L. J. Ch. 69 495
Doulton & Co. *v.* Beguinot, 8 L. N. 171 211
Dover *v.* Alexander, 2 Hare, 275 485
Downs *v.* Salmon, 20 Q. B. D. 775 312
Dowse *v.* Gorton, (1891) Ap. Ca. 190 501
Doyley *v.* Att.-Gen., 2 Eq. Ca. Ab. 194 421
Drake, Ex parte, 1 D. M. & De G. 539 360
Drake *v.* Drake, 8 H. L. Ca. 172; 29 L. J. Ch. 850; 3 L. T. 193 484
Drant *v.* Vause (Vance), 1 Y. & C. C. C. 580 69
Driver *v.* Broad, (1893) 1 Q. B. 539, 744; 63 L. J. Q. B. 12; 69 L. T. 169; 41 W. R. 415, 483 61
Drummond and Davis, Re, (1891) 1 Ch. 524 563

PAGE

Duddell *v.* Simpson, L. R. 2 Ch. Ap. 102 44
Dudley *v.* Folliet, 3 T. R. 584 361
Dudson, Re, 8 C. D. 628 563
Duff *v.* Valentine, W. N. (1883), p. 225 ..... 305, 307
Duggan *v.* Kelley, 10 Ir. Eq. 295 514
Duke of Newcastle, Re, 24 Ch. D. 129; 52 L. J. Ch. 645; 48 L. T. 779; 31 W. R. 782 ..... 145, 325, 438
Duke of Portland *v.* Hill, L. R. 2 Eq. 765 102
Dumpor's Case, 1 Sm. L. C. 41 ..... 343, 369
Duncan *v.* Dixon, 44 C. D. 211; 62 L. T. 319; 59 L. J. Ch. 437; 38 W. R. 700 ..... 5, 398
Duncan *v.* Patterson, 4 C. B. N. S. 267 246
Dunn *v.* Flood, 28 C. D. 586; 54 L. J. Ch. 370; 52 L. T. 699; 33 W. R. 760 38
Duppa *v.* Mayo, 1 Wms. Saund. 287 ..... 217, 346, 364
Durrand *v.* Friend, 5 De G. & S. 343 485
Dutton *v.* Thompson, 23 C. D. 278; 52 L. J. Ch. 661; 49 L. T. 109; 31 W. R. 596 477

E.

Eadie *v.* Addison, 52 L. J. Ch. 80; 47 L. T. 548; 31 W. R. 320 63
Eads *v.* Williams, 4 De G. M. & G. 674 74
Eager *v.* Furnival, 17 C. D. 115; 50 L. J. Ch. 537; 44 L. T. 464; 29 W. R. 649 532
Eagleton *v.* Horner, 57 L. J. Ch. 211 ..... 486, 490
Earl of Berkeley's Will, Re, L. R. 10 Ch. 56 445
Earl of Radnor, Re, 6 T. 480 448
Earle *v.* Maugham, 14 C. B. 626 352
Earle and Webster, Re, 24 C. D. 144; 48 L. T. 961; 31 W. R. 887 ..... 18, 467
Easum *v.* Appleford, 5 M. & C. 61 495
Ebbets *v.* Booth, 48 L. T. 961 365
Eccles *v.* Cheyne, 2 K. & J. 676 532
Ecclesiastical Commissioners *v.* Morral, L. R. 4 Ex. 162; 38 L. J. Ex. 93; 20 L. T. 573; 17 W. R. 676 328
Eden *v.* Smyth, 5 Ves. 341 517
Ederick *v.* Hawker, L. R. 18 Ch. D. 199; 50 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 913 350
Edge *v.* Boileau, 16 Q. B. D. 117; 53 L. T. 907; 55 L. J. Q. B. 90 362
Edge *v.* Worthington, 1 Cox, 211 274
Edgell *v.* Day, 1 H. & R. 8 39
Edgell *v.* Wilson, W. N. (1893) 145 275
Edmonds (Edwards) *v.* Marcus, W. N. (1894) 24 308
Edmunds *v.* Waugh, L. R. 1 Eq. 418 241
Edwards, Re, L. R. 9 Ch. App. 97; 43 L. T. Ch. 265; 29 L. T. 712; 22 W. R. 144 396
Edwards *v.* Carter, (1893) A. C. 360; 69 L. T. 153 ..... 5, 6, 324, 325, 398
Edwards *v.* Edwards, 7 Q. B. D. 523; 50 L. J. Q. B. 661; 45 L. T. 403 ..... 314, 520

PAGE

Edwards v. Hammond, 3 Lev. 132 509
Edwards v. Marston, (1891) 1 Q. B. 225 307
Edwards v. Marcus, W. N. (1894) 24 ..... 308, 314
Edwards v. Wickwar, L. R. 1 Eq. 68; 35 L. J. Ch. 48; 13 L. T. 428; 14 W. R. 79 ..... 46, 104
Edwick v. Hawkes, L. R. 18 Ch. D. 199; 50 L. J. Ch. 577; 45 L. T. 168; 29 W. R. 913 358
Egerton v. Earl Brownlow, 4 H. L. C. 210; 23 L. Ch. 348 482
Egmont's (Lord) Estates, Re, L. R. 49 Ch. 306; 59 L. J. 768; 63 L. T. 508 461
Eley, Re, 37 C. D. 40; 56 L. J. Ch. 905; 57 L. T. 253 591
Eli-Hickson v. Darlow, 52 L. J. Ch. 453; 48 L. T. 449; 31 W. R. 417 ..... 295, 391
Elison v. Elwin, 13 Sim. 309 213
Elliot v. Ince, 7 D. M. & G. 475 3
Elliot v. Johnson, L. R. 2 Q. B. 120; 36 L. J. Q. B. 41; 15 W. R. 253 .. 342
Elliot v. Merryman, 2 L. C. Eq. 193, 414
Ellis v. Goulton, (1893) 1 Q. B. 350; 62 L. J. Q. B. 232; 68 L. T. 144; 41 W. R. 411 39
Ellison's Trusts, 2 Jur. 253 559
Ellison v. Ellison, 6 Ves. 656 476
Ellison v. Thomas, 7 De G. J. & S. 18 433
Elwes v. Mawe, 3 East, 38 374
Emanuel v. Bridger, L. R. 9 Q. B. 286; 43 L. J. Q. B. 96 318
Emmanuel and Simmonds, Re 33 Ch. D. 40 ..... 385, 583, 589
English and Scottish Investment Society v. Brunton, (1892) 2 Q. B. 1; 66 L. T. 766 211
Errington v. Met. Dist. Rail. Co., 19 C. D. 559 172
Essex v. Daniell, L. R. 10 C. P. 538; 38 L. T. 476 191
Evans v. Cheshire, Ves. Supp. 300 168
Evans v. Davis, 10 C. D. 747; 48 L. J. Ch. 223; 39 L. T. 391; 27 W. R. 285 364
Evans v. Roberts, 8 D. & R. 611 61
Evans v. Scott, 1 H. L. C. 43 ..... 434, 510
Everett v. Everett, L. R. 19 Ex. 405; 22 L. T. 507; 18 W. R. 1020 .. 477
Eynston (Eyston), Ex parte, 7 C. D. 145; 47 L. J. Bk. 62; 37 L. T. 447; 26 W. R. 181 402
Eyre, Re, W. N. (1883) 158 560
Eyre v. Eyre, 49 L. T. 259 575
Eyre v. Shaftesbury, 1 L. C. Eq. 533
Eyston, Ex parte, 7 C. D. 145; 47 L. J. Bk. 62; 37 L. T. 447; 26 W. R. 181 360

F.

Fain v. Ayres, 2 Sim. & Stu. 533 ..... 137, 182
Fairly v. Tuck, 27 L. J. Ch. 28; 3 Jur. N. S. 1089 125
Falcke v. Scottish Imperial Co., L. R. 34 Ch. D. 234; 56 L. T. 220; 35 W. R. 143 271

PAGE

Farhall *v.* Farhall, L. R. 7 Ch. Ap. 123; 41 L. J. Ch. 146; 25 L. T. N. S. 685; 20 W. R. 157 231
Farrant *v.* Spencer, 7 Ves. sen. 97 494
Farrar *v.* Farrar, 2 Law Notes, 358 ..... 20, 413
Farrington *v.* Foster (Forester), (1893) 2 Ch. 46; 62 L. J. Ch. 296; 69 L. T. 45 398
Fearnside *v.* Flint, L. R. 22 Ch. D. 579; 52 L. J. Ch. 479; 48 L. T. N. S. 154; 31 W. R. 318 ..... 218, 241
Feast *v.* Robinson, W. N. (1894) 14 313
Fenton *v.* Clegg, 9 Ex. 680; 2 C. L. R. 1014; 23 L. J. Ex. 197 330
Fergusson to Buckley, Re, 21 L. R. Ir. 392 591
Festing *v.* Allen, 12 M. & W. 279 509
Field, Re, 33 W. R. 553; 54 L. J. Ch. 661; 52 L. T. 480; 9 Hare, 414 ..... 302, 493, 585, 586, 589
Field *v.* Hopkins, 44 C. D. 524; 62 L. T. 774 276
Fielden *v.* Slater, 38 L. J. Ch. 379 357
Filliter *v.* Phippard, 17 L. J. Q. B. 89; 11 Q. B. 347 341
Finch *v.* Underwood, L. R. 2 Ch. D. 310 360
Firth, Ex parte, Re Cowburn, L. R. 19 Ch. D. 419; 51 L. J. Ch. 473; 45 L. T. N. S. 120; 30 W. R. 529 310
Fisher *v.* Doody, (1893) 1 Ch. 129; 68 L. T. 127; 41 W. R. 49 276
Fisher *v.* Shirley, 43 C. D. 290; 59 L. J. Ch. 29; 61 L. T. 668; 38 W. R. 70 396
Fitz *v.* Iles, (1893) 1 Ch. 77; 62 L. J. Ch. 258; 68 L. T. 108 357
Fitzgerald *v.* Fauconberg, Fitz. 297; 2 Eq. Cas. Abr. 682 (D.), n. (b) .. 110
Fitzgerald Trustees *v.* Melluish, (1892) 1 Ch. 385 274
Fitzroy *v.* Harris, W. N. (1891) 76 568
Fleet *v.* Perrins, L. R. 4 Q. B. 500; 37 L. J. Q. B. 536; 19 L. T. N. S. 147 214
Fleetwood *v.* Green, 15 Ves. 59 67
Fleming *v.* Buchanan, 3 De G. M. & G. 976 528
Fleming *v.* Hardcastle, 52 L. T. 851; 33 W. R. 776 ..... 585, 586, 588, 589
Flight *v.* Bolland, 4 Russ. 298 ..... 5, 72
Flower *v.* Hartopp, 6 Beav. 476; 12 L. J. Ch. 39 48
Flower *v.* Metropolitan Board of Works, 27 Ch. D. 592; 32 W. R. 1011; 53 L. J. Ch. 955; 51 L. T. 257 192
Flureau *v.* Thornhill, 2 W. Bl. 1078 71
Forbes *v.* Jackson, L. R. 19 Ch. D. 615; 51 L. J. Ch. 690; 30 W. R. 652 248
Forbes *v.* Phipps, 1 Eden, 502 214
Ford and Hill, Re, L. R. 10 Ch. D. 365; 48 L. J. Ch. 327 ..... 126, 130
Ford *v.* Kettle, L. R. 9 Q. B. D. 139; 51 L. J. Q. B. 558; 46 L. T. N. S. 666; 30 W. R. 741 313
Forshaw *v.* Higginson, 20 Beav. 405 420
Forster *v.* Patterson, L. R. 17 Ch. D. 132; 50 L. J. Ch. 603; 44 L. T. N. S. 465; 29 W. R. 463 249
Forth *v.* Chapman, 1 P. Wms. 663 529
Foster and Lister, Re, L. R. 6 Ch. D. 87; 46 L. J. Ch. 480; 36 L. T. 582; 25 W. R. 553 473
Foster *v.* Cockerell, 3 Cl. & F. 156 213

PAGE
Foster *v.* Commissioners of Inland Revenue, W. N. (1893) 192 ....224, 545
Fourth City Benefit Building Society *v.* Williams, L. R. 14 Ch. D. 140; 49 L. J. Ch. 245; 42 L. T. N. S. 615; 38 W. R. 572 284
Fowell *v.* Franter, 3 H. & C. 458; 34 L. J. Ex. 6; 11 Jur. N. S. 64; 11 L. T. N. S. 631; 13 W. R. 145 338
Fowkes *v.* Williams, 42 C. D. 93; 58 L. J. Ch. 451; 61 L. T. 58 428
Fowler *v.* Cohen, 2 Beav. 360; 20 Jur. 315; 26 L. T. 249; 4 W. R. 412 573
Fowler *v.* Harvey, 11 W. R. 899 250
Fox *v.* Bennett, 5 Law Notes, 39 293
Fox *v.* Bishop of Chester, 6 Bing. 16 220
Fox *v.* Hawks, L. R. 13 Ch. D. 822; 49 L. J. Ch. 579; 42 L. T. 622; 28 W. R. 566 479
Fox *v.* Macreth, 1 W. & T. L. C. Eq. 30
Fox *v.* Swan, Sty. 483 359
Frampton *v.* Stephens, L. R. 21 Ch. D. 164; 51 L. J. Ch. 562; 46 L. T. 617 100
Fraser *v.* Pendlebury, 31 L. J. C. P. 1; 10 W. R. 104..... 165
Freeman *v.* Edwards, 2 Ex. 732; 17 L. J. Ex. 264 264
Freeman *v.* Pope, 5 Ch. Ap. 538 475
Freme *v.* Wright, 4 Madd. 364 .....46, 57
French *v.* Hope, 56 L. J. Ch. 363; 56 L. T. 57..... 277
Frewen *v.* James, 38 C. D. 383; 57 L. J. Ch. 1052; 59 L. T. 131; 36 W. R. 840 461
Frisby, Re, Allison *v.* Frisby, 43 C. D. 106; 59 L. J. Ch. 94; 61 L. T. 632; 38 W. R. 65..... 241
Frisby *v.* Owen, 66 L. T. 718..... 502
Fry *v.* Capper, 1 Kay, 170; 2 W. R. 136 570
Fry *v.* Noble, 20 Beav. 598; 24 L. J. Ch. 591; 1 Jur. N. S. 767 125
Fry *v.* Tapson, L. R. 28 Ch. D. 268; 54 L. J. Ch. 224; 51 L. T. N. S. 362; 33 W. R. 113 413
Fulford *v.* Fulford, 16 Beav. 565.....520, 531
Fuller *v.* Bennett, 2 Hare, 394; 12 L. J. Ch. 355..... 132
Fuller *v.* Knight, 6 Beav. 205; 12 L. J. Ch. 182 229
Furnival *v.* Hudson, (1893) 1 Ch. 335; 62 L. J. Ch. 178; 68 L. T. 378; 41 W. R. 358 304
Furtardo *v.* Lumley, 54 J. P. 407 39

G.

G., Re, An Infant, (1892) 1 Ch. 292..... 533
Gainsford *v.* Dunn, L. R. 17 Eq. 405.....572, 573
Gaitskell, Re, L. R. 15 Eq. 386; 28 L. T. N. S. 760; 21 W. R. 768..522, 543
Gale *v.* Gale, 21 Beav. 349; 4 W. R. 477 471
Games *v.* Bonner, 33 W. R. 64 95
Gapp *v.* Bond, 19 Q. B. D. 200; 56 L. J. Q. B. 438; 57 L. T. 437; 35 W. R. 683 296
Gardiner, Re, Ex parte Coulson, 20 Q. B. D. 249; 57 L. J. Ch. 420; 57 L. T. 848; 36 W. R. 413 390
Gardner *v.* Ingram, 61 L. T. 729..... 373

PAGE
Gardner *v.* Sheldon, Tudor, Con. Cases 530
Garland, Ex parte, 10 Ves. 110 502
Garland *v.* Mead, L. R. 6 Q. B. 441; 40 L. J. Q. B. 179; 24 L. T. N. S. 421; 19 W. R. 1156 205
Garraud, Re, Ex parte Newitt, 16 C. D. 522; 51 L. J. Ch. 381; 44 L. T. 5; 29 W. R. 344 293
Gath *v.* Barton, 1 Beav. 478 512
Gaze *v.* Gaze, 3 Curt. 451 538
Geary *v.* Bearcroft, O. Bridg. 484 338
Gee *v.* Barnes, W. N. (1876) 76 307
General Credit and Discount Co. *v.* Glegg, L. R. 22 Ch. D. 549; 52 L. J. Ch. 297; 48 L. T. N. S. 182; 31 W. R. 421 ..... 242, 250
General Finance Co. *v.* Liberation Building Society, L. R. 10 Ch. D. 15; 19 L. T. N. S. 600; 27 W. R. 210 165
George, Re, L. R. 5 Ch. D. 837; 47 L. J. Ch. 118; 26 W. R. 65 405
German *v.* Chapman, L. R. 7 Ch. App. 271; 47 L. J. Ch. 250; 37 L. T. N. S. 615; 26 W. R. 719 358
Gerard's Settled Estates, Re, (1893) 3 Ch. 252; 63 L. J. Ch. 23; 69 L. T. 393 457
Gibbons' (John) Trusts, Re, 30 W. R. 287; W. N. (1882) 12 419
Gibson *v.* Doeg, 2 H. & N. 615; 27 L. J. Ex. 37 358
Gibson *v.* Way, 56 L. J. 389; 56 L. T. 80 395
Gilbert *v.* Overton, 2 H. & M. 110; 12 W. R. 1141 479
Gilbert *v.* Smith, L. R. 11 Ch. D. 78; 5 App. Ca. 651; 48 L. J. Ch. 352; 40 L. T. N. S. 635; 27 W. R. 719 87
Gilliatt *v.* Gilliatt, L. R. 9 Eq. 60; 39 L. J. Ch. 142; 21 L. T. N. S. 522; 18 W. R. 203 58
Gilroy *v.* Bowey, 59 L. T. 233 ..... 303, 307
Gittings *v.* McDermott, 2 M. & K. 75 490
Glenny and Hartley, Re, L. R. 25 Ch. D. 611; 53 L. J. Ch. 417; 50 L. T. N. S. 79; 32 W. R. 457 418
Gloag and Miller, Re, L. R. 23 Ch. D. 320; 52 L. J. Ch. 654; 48 L. T. N. S. 629; 31 W. R. 601 ..... 57, 136
Goddard's case, 1 Salk. 463 157
Godfrey (Godrey) *v.* Falkner, L. R. 23 Ch. D. 483; 52 L. J. Ch. 820; 42 L. T. N. S. 353; 32 W. R. 23 229
Godfrey *v.* Watson, 3 Atk. 518 288
Gold and Norton's Contract, 53 W. R. 333; 52 L. T. 321; W. N. (1885) 6 44
Goldstrow *v.* Tallerman, 18 Q. B. D. 1; 56 L. J. Q. B. 22; 55 L. T. 856; 35 W. R. 68 ..... 305, 307
Goodchild *v.* Dougal, L. R. 3 Ch. D. 650; 24 W. R. 960 158
Goodland *v.* Burnett, 1 Camp. 477 498
Goodright *v.* Stravan, Cowp. 201 326
Gordon *v.* Gordon, 1 Mer. 144 483
Gorton *v.* Smart, 1 Sim. & S. 66 357
Gossling *v.* Woolf, (1893) 1 Q. B. 39; 68 L. T. 89; 41 W. R. 106 .. 34, 52, 106, 324
Gott *v.* Gandy, 2 El. & Bl. 485; 2 C. L. R. 392; 23 L. J. Q. B. 1; 18 Jur. 310 341
Gourlay *v.* Duke of Somerset, 1 V. & B. 68, 72 336

PAGE
Grace *v.* Card, 6 Times Rep. 74 293
Gradwell *v.* Aichison, 10 T. R. 20 591
Graham *v.* Lee, 23 B. 388 516
Graham *v.* Tate, 1 M. & S. 609 352
Graham *v.* The Corporation of Newcastle, 67 L. T. 790; 9 T. 130 358
Grant *v.* Ellis, 9 M. & W. 113 348
Grant *v.* Grant, L. R. 1 P. & D. 654; 38 L. J. Prob. 55; 20 L. T. N. S. 684 489
Graves, Ex Parte, Harris, Re, L. R. 19 Ch. D. 1; 51 L. J. Ch. 1; 45 L. T. N. S. 397; 30 W. R. 51 11
Graves *v.* Weld, 5 B. & Ad. 105; 2 N. & M. 725 61
Great Northern Rail. Co. *v.* Sanderson, L. R. 25 Ch. D. 788; 58 L. J. Ch. 445; 50 L. T. N. S. 87; 32 W. R. 519 56
G. W. Rail. Co. *v.* Smith, L. R. 3 App. Cas. 165; 47 L. J. Ch. 97; 37 L. T. N. S. 645; 26 W. R. 130 ..... 364, 371
Greaves *v.* Topfield, L. R. 14 Ch. D. 563; 43 L. T. N. S. 100; 28 W. R. 840 ..... 150, 218
Greaves *v.* Wilson, 25 Beav. 290; 27 L. J. Ch. 546; 4 Jur. N. S. 802.. 43
Green *v.* Briggs, 6 Ha. 632 275
Green *v.* Dunn, 20 Beav. 6; 3 W. R. 277 495
Green *v.* Eales, 2 Q. B. 225 353
Green *v.* Green, 2 Mer. 86 530
Green *v.* Marsh, (1892) 2 Q. B. 330; 60 L. T. 480; 61 L. J. Ch. 558; 40 W. R. 449 ..... 264, 292, 306
Green *v.* Sevin, L. R. 13 Ch. D. 589; 49 L. J. Ch. 166; 41 L. T. N. S. 724 42
Greenaway *v.* Adams, 12 Ves. 395 360
Greenham *v.* Child, 24 Q. B. D. 29; 59 L. J. Q. B. 27; 61 L. T. 563; 38 W. R. 94 311
Greenham *v.* Gibbeson, 4 Moo. & Sc. 198 568
Greenhill *v.* North British, &c. Insurance Co., (1893)3 Ch. 474; 62 L. J. Ch. 918; 69 L. T. 526; 42 W. R. 91 399
Greenwell *v.* Davidson, 7 Law Notes, p. 108 492
Greenwood *v.* Greenwood, (1892) 2 Ch. 295; 61 L. J. Ch. 558; 67 L. T. 76; 40 W. R. 681 ..... 506, 519
Gresly *v.* Mousley, 2 De G. F. & J. 433; 8 Jur. N. S. 320; 6 L. T. N. S. 86; 10 W. R. 222 19
Grey *v.* Siggers, L. R. 15 Ch. D. 74 525
Grey *v.* Stamford, W. N. (1892) 93 486
Griffin *v.* Tomkins, 42 L. T. 359 370
Griffin *v.* Union Deposit Bank, 6 Law Notes, p. 172 308
Griffiths *v.* Pound, 45 C. D. 553; 59 L. J. Ch. 522 237
Griffiths *v.* Vere, 9 Ves. 127 ..... 436, 524
Grigg *v.* National Guardian Assurance Co., 64 L. T. 787; 39 W. R. 684; (1891) 3 Ch. 206 292
Grimshaw, Re, L. R. 11 Ch. D. 406; 48 L. J. Ch. 399; 27 W. R. 544.. 501
Grissell, Re, Ex parte Jones, 12 C. D. 454; 48 L. J. Bk. 109; 40 L. T. 790; 28 W. R. 237 390
Groves *v.* Musther, 43 C. D. 569; 59 L. J. Ch. 296 487
Grymes *v.* Boweren 6 Bing. 437 374
Gunnis *v.* Erhart, 1 H. Bl. 289 58

PAGE
Guteridge *v.* Munyard, 7 C. & P. 179 353
Guthrie *v.* Walron, 22 Ch. D. 573 559

H.

Haddon *v.* Arrowsmith, Owen, 73 327
Hadgett, Re, L. R. 3 Ex. D. 46 422
Hadgett *v.* Commissioners of Inland Revenue, 3 Ex. Div. 46; 37 L. T. R. 612 480
Hadley *v.* Baxendale, 9 Ex. 341; 23 L. J. Ex. 179; 18 Jur. 358 71
Haggerstone *v.* Hanbury, 5 B. & C. 101; 7 D. & R. 723 170
Haines *v.* Guthrie, 13 Q. B. D. 818; 53 L. J. Q. B. 521; 51 L. T. 645; 33 W. R. 99 116
Haldane *v.* Johnson, 8 Ex. 689; 22 L. J. Ex. 264; 17 Jur. 937 347
Halifax *v.* Wilson, 10 Ves. 168 523
Hall, Re, Ex parte Close, 14 Q. B. D. 386; 54 L. J. Q. B. 43; 51 L. T. 645; 33 W. R. 99 294
Hall *v.* City of London Brewery, 2 B. & S. 737; 31 L. J. Q. B. 257; 9 Jur. N. S. 18 345
Hall *v.* Ewen and M'Neff, 37 Ch. D. 74; 57 L. J. Ch. 95; 57 L. T. 831 ..... 178, 185, 345
Hall *v.* Hall, 8 Ch. D. 430; 47 L. J. Ch. 680 ..... 477, 495
Hall *v.* Hewer, Amb. 203 570
Hall *v.* Smith, 14 Ves. 426 133
Hall *v.* Warren, 9 Ves. 610 2
Hallas *v.* Robinson, 33 W. R. 426 298
Hallett *v.* Middleton, 1 Russ. 243 182
Halton *v.* Foster, L. R. 3 Ch. Ap. 505 407
Hamilton *v.* Chaine, 7 Q. B. D. 319; 50 L. J. Q. B. 456; 44 L. T. 764; 29 W. R. 676 309
Hamilton *v.* Hamilton, W. N. (1894) 13 ..... 398, 405
Hamlyn *v.* Beltley, 5 C. P. D. 319; 49 L. J. C. P. 465; 42 L. T. 373; 28 W. R. 676 309
Hammerton *v.* Stead, 3 B. & C. 478; 5 D. & R. 206 371
Hammond, Ex parte, Re Hockey, 12 Q. B. D. 291; 53 L. J. Q. B. 208; 50 L. T. 267 298
Hammond *v.* Hammond, 19 Beav. 29 164
Hammond *v.* Hocking, 12 Q. B. D. 291; 53 L. J. Q. B. 205; 50 L. T. 267 ..... 303, 305, 307
Hampden *v.* Earl of Buckingham, (1893) 2 Ch. 531; 62 L. J. Ch. 643; 68 L. T. 695; 41 W. R. 516 ..... 445, 455
Hampshire *v.* Wickens, 7 Ch. D 555; 47 L. J. Q. B. 205; 50 L. T. 267 ..... 346, 363
Hancock *v.* Hancock, W. N. (1887) 201 ..... 391, 396
Hanson, Ex parte, 12 Ves. 149 76
Hanson *v.* Derby, 2 Vern. 392 260
Hanson *v.* Graham, 6 Ves. 239 ..... 511, 572
Harbin *v.* Darby, Re Ames, 28 Beav. 325; 29 L. J. Ch. 622; 6 Jur. 906; 8 W. R. 512 416

PAGE
Harding's Settled Estates, Re, (1891) 1 Ch. 60; 39 W. R. 118; 63 L. T. 539 466
Hardman *v.* Child, 28 C. D. 712; 54 L. J. Ch. 695; 52 L. T. 465; 33 W. R. 544 43
Hardy *v.* Rees, 4 Ves. jun. 380 287
Hare *v.* Elms, (1893) 1 Q. B. 604; 62 L. J. Q. B. 187; 68 L. T. 223; 41 W. R. 297 368
Harford's Trusts, Re, 13 Ch. D. 135; 41 L. T. 382; 28 W. R. 239 418
Harford *v.* Browning, 1 Cox, 302 491
Harford *v.* Purrier, 1 Madd. 539 66
Hargraves *v.* Rothwell, 1 Keen, 160 132
Hargreaves and Thompson, Re, 32 Ch. D. 454; 55 L. T. 239; 34 W. R. 708 155
Harnett *v.* Maitland, 16 M. & W. 257 341
Harris, Ex parte, 53 L. T. 655; 55 L. J. M. C. 24; 16 Q. B. D. 130 .. 349
Harris, Re, Ex parte Graves, 19 C. D. 1; 51 L. J. Ch. 1; 45 L. T. 397; 30 W. R. 51 11
Harris *v.* Harford, W. N. (1888) 190 7
Harris *v.* Tubb, 42 C. D. 79; 58 L. J. Ch. 434; 60 L. T. 699; 38 W. R. 75 473
Harris's Settled Estate, Re, 54 L. J. Ch. 208; 51 L. T. 855; 33 W. R. 393 470
Harrison, Ex parte, 18 C. D. 127 ..... 264, 265
Harrison *v.* Good, L. R. 11 Eq. 338; 40 L. J. Ch. 71; 24 L. T. 263; 19 W. R. 346 ..... 184, 357
Harrison *v.* Jackson, 1 R. & M. 71 504
Harrop's Trusts, Re, 48 L. T. 937 ..... 422, 465
Hart *v.* Hart, 18 Ch. D. 270; 50 L. J. Ch. 697; 45 L. T. 13; 30 W. R. 8 108
Hart *v.* Windsor, 12 M. & M. 61; 13 L. J. Ex. 129 341
Harter *v.* Coleman, 19 Ch. D. 630; 51 L. J. Ch. 681 236
Hartley *v.* King, 5 Tyrwh. 692 342
Harvey, Re, 13 Ch. D. 316 528
Harvey *v.* Gillow, (1893) 1 Ch. 567; 62 L. J. Ch. 323; 68 L. T. 562; 41 W. R. 593 ..... 520, 531
Harvey *v.* King, 2 C. M. & R. 18 209
Haseltine (Heseltine) *v.* Simmons, (1892) 2 Q. B. 547; 62 L. J. Q. B. 5; 67 L. T. 611; 41 W. R. 67 ..... 304, 311, 316
Hassall *v.* Wright, L. R. 20 Eq. 509; 40 L. J. Ch. 145 219
Hastie's Trusts, Re, 35 Ch. D. 728; 56 L. J. Ch. 974; 56 L. T. 168; 35 W. R. 692 486
Hatton *v.* Hayward, L. R. 9 Ch. App. 299 145
Havens *v.* Middleton, 10 Ha. 641; 22 L. J. Ch. 746; 17 Jur. 271 356
Hayne *v.* Payne (Payne *v.* Haine), 16 M. & W. 541; 16 L. J. Ex. 130.. 354
Haynes, Re, 37 C. D. 306 445
Haynes *v.* Haynes, 1 D. & S. 426 23
Haywood *v.* Brunswick Building Society, 8 Q. B. D. 403; 51 L. J. Q. B. 73 345
Hazle's Settled Estates, Re, 26 Ch. D. 428; 53 L. J. Ch. 574; 50 L. T. 530; 32 W. R. 701 440
Hazlewood *v.* Consolidated Co., 63 L. T. 71; 6 T. 315; 39 W. R. 55.. 307

PAGE
Heap *v.* Barton, 21 L. J. C. P. 153 374
Hearle *v.* Greenbank, 3 Atk. 716 4
Heath *v.* Crealock, 10 C. D. 22 165
Heatherington *v.* Groome, 13 Q. B. D. 789; 53 L. J. Q. B. 576; 33 W. R. 103; 51 L. T. 412 305
Hebblethwaite *v.* Cartwright, Cas. temp. Talbot, 31 486
Hele *v.* Bond, Pr. Ch. 474 568
Hellas (Hallas) *v.* Robinson, 33 W. R. 426 335
Hellier *v.* Casbard, 1 Sid. 266 339
Helsey (Helsby), Re, W. N. (1893) 189 390
Henderson *v.* Hey, 3 Bro. C. C. 632 ..... 346, 357
Henderson *v.* Squire, L. R. 4 Q. B. 170; 38 L. J. Q. B. 73 383
Henniker *v.* Henniker, 22 L. J. Q. B. 94; 1 E. & B. 24 224
Henry *v.* Armstrong, 18 Ch. D. 668; 44 L. T. 918; 30 W. R. 472 477
Henthorn *v.* Fraser, (1892) 2 Ch. 27; 61 L. J. Ch. 373; 66 L. T. 439; 40 W. R. 433; 8 T. 459 64
Henty *v.* Wray, 19 Ch. D. 492; 45 L. T. 725; 30 W. R. 715 574
Hepburn *v.* Skirving, 4 Jur. 651 498
Herbert, Re, 34 Ch. D. 504; 35 W. R. 606; 66 L. J. Ch. 719; 56 L. T. 522 590
Herne *v.* Benbow, 4 Taunt. 764 340
Hertford (Marquis of) *v.* Lowther 504
Hester *v.* Hester, 34 Ch. D. 607; 56 L. J. Ch. 247; 55 L. T. 669, 862; 35 W. R. 233 587
Hetherington *v.* Groome, 13 Q. B. D. 789; 53 L. J. Q. B. 576; 51 L. T. 412; 33 W. R. 103 303
Hetling and Merton's Contracts, Re, (1893) 3 Ch. 269; 62 L. J. Ch. 783; 69 L. T. 266; 42 W. R. 19 ..... 45, 192
Hewer *v.* Cox, 3 E. & E. 428; 30 L. J. Q. B. 73; 6 Jur. 1339; 3 L. T. 508; 9 W. R. 143 312
Hewinson *v.* Negus, 16 Beav. 594; 22 L. J. Ch. 655; 17 Jur. 567 472
Heyward *v.* Brunswick Building Society, 8 Q. B. D. 403; 51 L. J. Q. B. 73; 45 L. T. 699; 30 W. R. 299 ..... 178, 185
Hibbert *v.* Lloyd, (1893) 1 Ch. 129; 62 L. J. Ch. 14; 68 L. T. 128; 41 W. R. 49 276
Hickson *v.* Darlow, 23 Ch. D. 690; 52 L. J. Ch. 453; 48 L. T. 449; 31 W. R. 417 301
Higginbottom, Re, (1893) 3 Ch. 132; 62 L. J. Ch. 74; 67 L. T. 190 .. 420
Higginbottom *v.* Holme, 19 Ves. 88 401
Higgins and Percival's Contract, Re, 57 L. J. Ch. 807; 59 L. T. 213 ..... 53, 107
Higgins *v.* Senior, 8 M. & W. 834; 11 L. J. Ex. 199 329
Higgins' Contract, Re, 21 Ch. D. 95 23
Higginson *v.* Clowes, 15 Ves. 516 58
Hildesheim, Re, (1893) 2 Q. B. 357; 69 L. T. 294, 550; 42 W. R. 138.. 548
Hill *v.* Barclay, 18 Ves. 56 355
Hill *v.* Crook, L. R. 6 H. L. 265 486
Hill *v.* Edward, W. N. (1885), 32 352
Hill *v.* Grant, Re Dickson, 29 Ch. D. 331; 54 L. J. Ch. 510; 52 L. T. 707; 33 W. R. 511 405
Hill *v.* Kirkwood, 42 L. T. 105; 28 W. R. 358 300

PAGE
Hill *v.* Lane, L. R. 11 Eq. 215; 40 L. J. Ch. 41; 23 L. T. 547; 19 W. R. 194 28
Hill *v.* Spurgeon, 40 C. D. 637; 58 L. J. Ch. 272; 60 L. T. 254; 37 W. R. 475 591
Hill *v.* Swartz, (1892) 3 Ch. 510; 62 L. J. Ch. 55; 67 L. T. 77; 41 W. N. 120 ..... 395, 396
Hill *v.* Walker, 4 K. & J. 166 500
Hillary *v.* Waller, 12 Ves. 239 108
Hillman, Ex parte, 10 Ch. D. 622 473
Hindmarch, Re, The River Steam Co.'s case, 1 D. & S. 129 74
Hirst *v.* Horn, 6 M. & W. 393 383
Hochaday, Re, Ex parte Nelson, 55 L. T. 819; 35 W. R. 264 311
Hockey, Re, Ex parte Hammond, 12 Q. B. D. 291; 53 L. J. Q. B. 205; 50 L. T. 267 298
Hodges, Re, L. R. 16 Eq. 92 513
Hodges *v.* Hodges, 13 Ch. D. 216 ..... 7, 528
Hodgkinson *v.* Cooper, 9 Beav. 304; 15 L. J. Ch. 160 129
Hodgkinson *v.* Crowe, L. R. 19 Eq. 591; 44 L. J. Ch. 239; 23 W. R. 885 ..... 346, 363
Hodgkiss, Re, L. R. 8 Eq. 643 522
Hodgson *v.* Ball, 14 Sim. 547 523
Hodgson *v.* Clark, 1 De G. F. & J. 394 484
Hodgson *v.* Dean, 2 S. & S. 221 110
Hodgson *v.* Halford, 11 Ch. D. 959 514
Hoey *v.* Green, W. N. (1884) 236 230
Holder *v.* Preston, 2 Wils. 400 526
Holgate *v.* Jennings, 24 Beav. 623 526
Holland Re, 16 Ch. D. 672 24
Holme *v.* Brunskill, 3 Q. B. D. 495; 47 L. J. C. P. 610; 38 L. T. 838.. 371
Holmes *v.* Penny, 26 L. J. Eq. 181 ..... 475, 516
Holroyd *v.* Marshall, 10 H. L. Cas. 191; 33 L. J. Ch. 193; 11 W. R. 171 298
Holt *v.* Collyer, 16 Ch. D. 718; 50 L. J. Ch. 311; 44 L. T. 214; 29 W. R. 502 358
Holyland *v.* Lewin, 26 Ch. D. 266; 53 L. J. Ch. 530; 51 L. T. 14; 32 W. R. 443 ..... 520, 531
Hood, Re, 68 L. T. 491; 42 W. R. 23 ..... 292, 293
Hood *v.* Hall, W. N. (1893) 161 505
Hoole *v.* Smith, 17 Ch. D. 434 256
Hooman, Ex parte, Re O'Connor, L. R. 12 Eq. 598; 19 W. R. 1058.. 312, 317
Hooper *v.* Clarke, L. R. 2 Q. B. 200; 36 L. J. Q. B. 79; 16 L. T. 152; 15 W. R. 347 174
Hope *v.* Hayley, 25 L. J. Bkcy. 155 298
Hope *v.* Hope, 8 De G. M. & G. 731 ..... 10, 101, 528
Hopkins *v.* Grazebrook, 6 B. & C. 31; 9 D. & R. 22 71
Horne, Re, 29 L. T. 830 467
Horsefall *v.* Mather, Holt, N. P. 7 340
Hough *v.* May, 4 A. & E. 954 347
Houghton Hall Estate, Re, 30 Ch. D. 102; 55 L. J. Ch. 37; 53 L. T. 196; 33 W. R. 869 ..... 445, 446, 448
Household Insurance Co. *v.* Grant, L. R. 4 Ex. D. 216 64

PAGE
Howard's Settled Estate, Re, (1892) 2 Ch. 233; 61 L. J. Ch. 311; 67 L. T. 156; 40 W. R. 360 460
Howard *v.* Harris, 1 Vern. 192 248
Howard *v.* Maitland, 11 Q. B. D. 695; 53 L. J. Q. B. 42 182
Howe *v.* Dartmouth, 7 Ves. 137 ..... 524, 525
Howe and Hodson's Contracts, Re, 56 L. T. 837 ..... 254, 256, 274, 275
Howe *v.* Scarrot, 28 L. J. Ex. 325 327
Howe *v.* Smith, 50 L. T. 573; 32 W. R. 802 ..... 39, 50, 51, 71
Howett *v.* Hall, 6 L. T. 348 ..... 219, 220
Howitt *v.* Harrington, W. N. (1893) 66 348
Hubert *v.* Treherne, 3 M. & G. 743 62
Hughes, Re, W. N. (1884) 53 ..... 129, 281
Hughes *v.* Hall 362
Hughes *v.* Little, 18 Q. B. D. 32; 56 L. J. Q. B. 96; 55 L. T. 473; 35 W. R. 36 306
Hughes *v.* Williams, 12 Ves. 493 288
Hughes *v.* Winne, 1 M. & K. 20 138
Humble *v.* Shore, 7 Hare, 247 533
Hume-Dick *v.* Lopes, (1892) A. C. 112; 61 L. J. Ch. 423; 66 L. T. 425; 40 W. R. 593 ..... 230, 408, 412
Humfrey *v.* Humfrey, 1 Sim. N. S. 536 ..... 493, 522
Humphreys *v.* Levett, (1893) 3 Ch. 1; 62 L. J. Ch. 498; 68 L. T. 780; 41 W. R. 390; 9 T. 138, 454 404
Hunt *v.* White, 37 L. J. Ch. 326 182
Hunter *v.* Dowling, (1893) 3 Ch. 212; 62 L. J. Ch. 617; 68 L. T. 780; 42 W. R. 107 545
Hunt-Foulston *v.* Furber, 3 Ch. D. 285; 24 W. R. 756 515
Hunter *v.* Nockolds, 19 L. J. Ch. 177 ..... 240, 348
Huntingdon *v.* Huntingdon, 2 White and Tudor's Equity Cases 247
Hurlbatt and Chator, (Chaytor), Re, 7 Law Notes, p. 41 ..... 27, 29
Hurst *v.* Hurst, 21 Ch. D. 278; 51 L. J. Ch. 729; 46 L. T. 899 559
Hussey *v.* Horne-Payne, L. R. 4 Ap. Ca. 811; 41 L. T. 1; 27 W. R. 585 63
Hutton (Hulton) *v.* Lister, 62 L. T. 200; W. N. (1890) 14; 6 T. L. R. 160 (C. A.) 163
Huxam *v.* Llewellyn, 21 W. R. 570 74
Hyam *v.* Terry, 25 Sol. Journal, 371 71
Hyde *v.* Warden, 3 Ex. D. 72; 47 L. J. Ex. 121; 37 L. T. 567; 26 W. R. 201 ..... 136, 208, 345, 346, 360, 363

I.

Imperial Loan Co. *v.* Stone, (1892) 1 Q. B. 592 ..... 2, 3
Inderwick, Re, 25 Ch. D. 301; 32 W. R. 233; 53 L. J. Ch. 287; 49 L. T. 755 ..... 581, 588
Inderwick *v.* Leach, 1 C. & E. 412 ..... 354, 355
Ingham *v.* Rayner, 13 L. N. 105 ..... 483, 489
Ingold *v.* Powell, 3 Law Notes, 370 477
Inman *v.* Sharp, 1 Stark. 12 62
Innes *v.* Jackson, 16 Ves. 367 247
Iredale *v.* Iredale, 25 Beav. 485 487

PAGE
Irish *v.* Irish, 40 C. D. 49; 58 L. J. Ch. 279: 60 L. T. 224; 37 W. R. 231.. 216
Isherwood *v.* Oldknow, 3 M. & S. 382 330
Izard, Ex parte, Casson *v.* Churchley, 23 Ch. D. 409; 52 L. J. Ch. 802; 49 L. T. 230; 32 W. R. 218 .....295, 299

J.

Jackson and Lidiard's Contracts, Re, 42 Ch. D. 254; 58 L. Ch. 785.... 108
Jackson and Oakshott, Re, L. R. 14 Ch. D. 851; 49 L. J. Ch. 253; 28 W. R. 794 43
Jackson *v.* Innes, 1 Bligh. 104 247
Jackson and Woodburne's Contract, Re, W. N. (1887) 182..... 155
Jacomb *v.* Harwood, 2 Ves. sen. 265 .....197, 330
Jago *v.* Jago, 68 L. T. 654 559
James *v.* James, L. R. 16 Eq. 153..... 247
James *v.* Shore, 1 Stark. N. P. C. 426 76
Jarvis *v.* Jarvis, 63 L. J. Ch. 10; 69 L. T. 412; W. N. (1893) 138 62
Jason *v.* Eyres, 2 Ch. Ca. 53 240
Jay *v.* Johnstone, (1893) 1 Q. B. 189; 62 L. J. Q. B. 126; 68 L. T. 129; 41 W. R. 161 .....146, 147, 148
Jebb *v.* Tugwell, 20 Beav. 84..... 571
Jeffery, Re, (1891) 1 Ch. 671 405
Jeffrey *v.* Tredwell, W. N. (1891) 35, 91..... 510
Jeffries *v.* Jeffries, 1 C. & P. 138 478
Jenkyn *v.* Vaughan, 3 Drew. 419 475
Jenner *v.* Jenner, L. R. 1 Eq. 361; 35 L. J. Ch. 329; 12 Jur. 138; 14 W. R. 305 164
Jenner *v.* Turner, 50 L. J. Ch. 161 514
Jennings *v.* Jordan, 6 Ap. Ca. 698..... 236
Jervis *v.* Tomkinson, 26 L. J. Ex. 41 337
Joddrell *v.* Seal, 44 C. D. 590; 59 L. J. Ch. 538; 63 L. T. 15; 38 W. R. 721 489
Johnson, Ex parte, Re Chapman, 26 Ch. D. 338; 53 L. J. Ch. 762; 50 L. T. 214; 32 W. R. 693 311
Johnson, Re, L. R. 20 Ch. D. 389..... 475
Johnson and Tustin, Re, 30 Ch. D. 42; 54 L. J. Ch. 889; 53 L. T. 281; 33 W. R. 737 .....33, 80, 139
Johnson *v.* Diprose, (1893) 1 Q. B. 512; 62 L. J. Q. B. 291; 68 L. T. 485; 41 W. R. 371 304
Johnson *v.* Evans, 61 L. T. 18 249
Johnson *v.* Johnson, 3 Hare, 157 .....7, 8, 9, 387, 494, 531
Johnson *v.* Smiley, 17 Beav. 223 47
Johnston *v.* Newton, 12 Hare, 160..... 413
Johnstone *v.* Huddlestone, 4 B. & C. 935..... 384
Jolliffe *v.* Baker, 11 Q. B. D. 225; 52 L. J. Q. B. 609; 48 L. T. 966; 32 W. R. 59.....31, 49
Jolly *v.* Handcock, 7 Ex. 820; 22 L. J. Ex. 38; 16 Jur. 550..... 196
Jones, Ex parte, Re Grissell, 12 Ch. D. 484; 48 L. J. Bkcy. 109; 28 W. R. 237; 40 L. T. 790 390
Jones, Re, 36 Ch. D. 105; 56 L. J. Ch. 720; 57 L. J. 26; 35 W. R. 649 590

PAGE
Jones *v.* Blake, 29 Ch. D. 913; 54 L. J. Ch. 880; 53 L. T. 302; 33 W. R. 886 16
Jones *v.* Carter, 15 M. & W. 718 364
Jones *v.* Davies, 8 Ch. D. 205; 47 L. J. Ch. 654; 38 L. T. 710; 26 W. R. 554 247
Jones *v.* Evans, 2 Ch. D. 420; 24 W. R. 778 489
Jones *v.* Foley, (1891) 1 Q. B. 730; 64 L. T. 538; 60 L. J. Q. B. 464; 39 W. R. 510 ..... 370, 383
Jones *v.* Frost (re Fiddey), L. R. 7 Ch. 773 165
Jones *v.* Harris, L. R. 7 Q. B. 157; 41 L. J. Q. B. 6 313
Jones *v.* Hensler, 19 Ch. D. 612 532
Jones *v.* Jones, 13 Sim. 561 ..... 336, 513
Jones *v.* Lock, L. R. 1 Ch. Ap. 25; 35 L. J. Ch. 117; 13 L. T. 514; 14 W. R. 149 478
Jones *v.* Manchester (Lady), Ventr. 197 568
Jones *v.* Mills, 10 C. B. 788; 31 L. J. C. P. 66; 8 Jur. 387 372
Jones *v.* Pott (Potts), (1893) 2 Q. B. 33; 62 L. J. Q. B. 436; W. N. (1893) 178; 42 W. N. 43; W. N. (1894), 178 340
Jones *v.* Rimmer, 14 C. D. 588 57
Jones *v.* Roberts, 9 Law Notes, 78 302
Jones *v.* Smith, 1 Ph. 244 131
Jones *v.* Southall, 32 Beav. 31 504
Jones *v.* Watts, 43 C. D. 574; 62 L. T. 471; 38 W. R. 725 105
Jones's Estate, Re, 46 L. T. N. S. 812 441
Joseph *v.* Lyon, 54 L. J. Q. B. 1; 51 L. T. 740 ..... 298, 335
Joyner *v.* Weekes, (1891) 2 Q. B. 31; 60 L. J. Q. B. 510; 65 L. T. 16; 39 W. R. 538 ..... 354, 355
Jupp *v.* Buckwell, 39 C. D. 148; 57 L. J. Ch. 774; 59 L. T. 129; 36 W. R. 712 485

K.

Kearsley, Re, L. R. 7 Ch. D. 615; 47 L. J. Ch. 474 155
Kearsley *v.* Phillips, 11 Q. B. D. 621; 52 L. J. Q. B. 269; 31 W. R. 467 264
Kearsley *v.* Woodcock, 3 Ha. 185 516
Keats *v.* Lyon, L. R. 4 Ch. Ap. 218 184
Keech *v.* Hall, 1 Doug. 21 ..... 261, 380, 381
Kekewich *v.* Manning, 1 De G. M. & G. 176 479
Kellock, Re, 56 L. T. 887; 35 W. R. 695 590
Kelly *v.* Hutton, L. R. 3 Ch. 703 554
Kelly *v.* Monk, 3 Ridge, 205 514
Kelly *v.* Rogers, (1892) 1 Q. B. 910; 61 L. J. Q. B. 604; 66 L. T. 582; 40 W. R. 516 362
Kelly *v.* Thomas (Thomas *v.* Kelly), 13 App. Cas. 506; 58 L. J. Q. B. 66; 37 W. R. 353 299
Kemp *v.* Bird, 5 C. D. 574 358
Kemp *v.* Darrett, 3 Camp. 510 337
Kemp *v.* Haynes, 37 C. D. 306 445
Kemp *v.* Sober, 1 Sim. N. S. 517 357

PAGE
Kempson *v.* Ashbee, L. R. 10 Ch. App. 15 ; 44 L. J. Ch. 195 ; 31 L. T. 525 ; 23 W. R. 38 561
Kennard *v.* Futvoye, 2 Giff. 81 ; 29 L. J. Ch. 553 249
Kennedy, Ex parte, Re Willis, 21 Q. B. D. 384 ; 57 L. J. Q. B. 634 ; 35 W. R. 793 .....264, 292, 294, 306
Kennedy *v.* Green, 3 M. & K. 716 134
Kenney's Trusts, Re, 13 App. Cas. 306, 520 454
Kepple *v.* Bailey, 2 M. & K. 517 183
Kerfield *v.* Seacombe, &c., 57 L. J. Ch. 270 171
Kermode *v.* Macdonald, L. R. 1 Eq. 459 ; 3 Ch. Ap. 584 ; 35 L. J. Ch. 358 ; 14 W. R. 415 503
Kerr *v.* Pawson, 25 Beav. 394 ; 27 L. J. Ch. 594 34
Kerr's Trusts, Re, L. R. 4 Ch. D. 600 ; 46 L. J. Ch. 409 ; 25 W. R. 390 573
Kershaw, Re, North *v.* Kershaw, W. N. (1888) 4 70
Ketsey's Case, Cro. Jac. 320 325
Kettlewell *v.* Watson, 26 Ch. D. 501 ; 53 L. J. Ch. 717 ; 51 L. T. 135 ; 32 W. R. 904 133
King, Re, 3 De G. & J. 63 ; 27 L. J. Ch. 33 493
King *v.* Cleveland, 4 De G. & J. 477 ; 28 L. J. Ch. 835 491
King *v.* Jones, 5 Taunt. 418 182
King *v.* Mullins, 1 Drew. 308 560
King *v.* Smith, 5 Ha. 239 ; 18 L. J. Ch. 43 287
Kinsman *v.* Rouse, 50 L. J. Ch. 486 249
Kirkland *v.* Briancourt, 6 T. 441 370
Kirkman *v.* Boothe, 11 Beav. 273 501
Kirwan *v.* Kirwan, 2 Cr. & M. 617 542
Kitchen *v.* Myers, W. N. (1886) 64 489
Kitford *v.* Blaney, L. R. 31 Ch. D. 56 ; 55 L. J. Ch. 185 ; 63 L. T. 17.. 17
Knatchbull's Settled Estate, Re, 29 Ch. D. 388 460
Knight *v.* Browne, 30 L. J. Ch. 649 401
Knight *v.* Majoribanks, 2 M. & G. 10 21
Knott, Re, L. R. 7 Ch. D. 549, n. 316

L.

Labouchere *v.* Dawson, 13 Eq. 322 ; 41 L. J. Ch. 427 ; 25 L. T. 894 ; 20 W. R. 309 215
Lacey, Re, 49 L. T. N. S. 755 .....585, 586, 587, 589, 590
Lacon *v.* Allen, 3 Drew. 579 ; 26 L. J. Ch. 18 273
Lacon *v.* Mertins, 3 Atk. 4 269
Laing, Re, L. R. 1 Eq. 416 467
Lamb *v.* Brewster, 4 Q. B. D. 220, 607 .....340, 352
Lancefield *v.* Iggulden, 10 Ch. Ap. 136 ; 44 L. J. Ch. 203 ; 31 L. T. 813 ; 23 W. R. 223 503
Lander's Contract, Re, (1892) 3 Ch. D. 41 ; 61 L. J. Ch. 707 ; 67 L. T. 521 ..... 336, 346
Lane *v.* Tyler, 56 L. J. Q. B. 461 303
Langford *v.* Pitt, 2 P. Wms. 629 182
Langham Hotel Co., Re, 10 Law Notes, 10 182

PAGE
Lantsburry *v.* Collier, 2 K. & J. 709; 25 L. J. Ch. 672 571
Lavery *v.* Pursell, W. N. 1888, 47 62
Lawrie *v.* Lees, 7 App. Ca. 17 370
Lawton *v.* Elwes, Re Corsellis, 34 Ch. D. 675; 35 W. R. 309; 56 L. J. Ch. 294; 56 L. T. 411 417
Lawton *v.* Lawton, 3 Atk. 30 374
Lawton *v.* Salmon, 1 H. Bl. 259 374
Lazarus *v.* Andrade, 5 Ch. D. 318; 49 L. J. C. P. 847; 43 L. T. 30; 29 W. R. 15 298
Lea *v.* Kendrick, 20 Q. B. D. 773; 59 L. T. 320 312
Leach *v.* Thomas, 7 C. & P. 239 ..... 340, 374
Leader (Searles) *v.* Thomas, (1891) 2 Q. B. 408; 65 L. T. 39; 39 W. R. 692 307
Leake's Trusts, Re 528
Leake *v.* Driffield, 24 Q. B. D. 98; 59 L. J. Q. B. 89; 61 L. T. 771; 38 W. R. 93 ..... 6, 161
Leake *v.* Robinson, 2 Mer. 382 ..... 511, 524
Leake *v.* Symonds, 15 Q. B. D. 629; 54 L. J. Q. B. 480 96
Lear *v.* Edmonds, 1 B. & A. 157 348
Lear *v.* Leggett, 1 R. & M. 696 516
Lee *v.* Howlett, 2 K. & J. 531 211
Lee *v.* Risdon, 7 Taunt. 188 ..... 62, 374
Lee *v.* Smith, 9 Ex. 622; 23 L. J. Ex. 198 334
Leeds *v.* Cheetham, 1 Sim. 146 355
Lees *v.* Whitely, L. R. 2 Eq. 143; 35 L. J. Ch. 412; 14 L. T. 472; 14 W. R. 539 356
Legg *v.* Goldwire, 1 L. C. Eq. 17 129
Leggott *v.* Barrett, 15 Ch. D. 306; 43 L. T. 641; 28 W. R. 962 215
Lehain *v.* Philpott, L. R. 10 Ex. 242; 44 L. J. Ex. 225; 33 L. T. 98; 23 W. R. 876 348
Leigh *v.* Leigh, 56 L. J. Ch. 125; 55 L. T. 634 ..... 230, 398, 409
Le Neve *v.* Le Neve, 2 L. C. Eq. 26 ..... 141, 143
Lepla *v.* Rogers, (1893) 1 Q. B. 31; 68 L. T. 384 361
Leslie, Re, L. R. 2 Ch. D. 185; 45 L. J. Ch. 668; 34 L. T. N. S. 239; 24 W. R. 546 ..... 271, 397
Levy, Re, Ex parte Walton, 17 C. D. 746 269
Levy *v.* Walker, 10 Ch. D. 436; 48 L. J. Ch. 273; 39 L. T. 654; 27 W. R. 370 215
Lewis Bowles' Case, Tudor's Con. Cas. 429
Lewis *v.* Brass, 3 Q. B. D. 667; 37 L. T. 738; 26 W. R. 152 63
Lewis *v.* Graham, L. T. (1886), 66 348
Lewis *v.* Guest, 1 Russ. 325 78
Leyland *v.* Steward, 4 C. D. 419 219
Lickorish, Ex parte, 25 Q. B. D. 176; 59 L. J. Q. B. 500; 38 W. R. 482 276
Lidiard and Jackson's Contracts, Re, 42 C. D. 254; 58 L. J. Ch. 785; 37 W. R. 793 114
Lillie *v.* Leigh, 3 De G. M. & G. 627 336
Lindsell *v.* Phillips, 30 Ch. D. 291; 53 L. T. 647 ..... 218, 241

PAGE
Lippingham *v.* Freeman, W. N. (1891) 198; 66 L. T. 357; 40 W. R. 348 45
Lister *v.* Lane, (1893) 2 Q. B. 212; 62 L. J. 583; 69 L. T. 176; 61 W. R. 626 353
Lister *v.* Stubbs, 45 C. D. 1; 62 L. T. 654; 59 L. J. Ch. 570; 38 W. R. 548 19
Litchford, Re, L. R. 2 Ch. D. 1719 325
Liverpool Commercial, &c. Co. *v.* Richardson, 55 L. J. Q. B. 455 307
Lloyd *v.* Rosbee, 2 Camp. 453 383
Locke *v.* Pearse, (1893) 2 Ch. 271; 62 L. J. Ch. 582; 68 L. T. 589; 41 W. R. 369 ..... 365, 367
Lockhart *v.* Hardy, 9 Beav. 349 286
Lockwood *v.* Wilson, 43 L. J. C. P. 179; 30 L. T. 761; 22 W. R. 919. 351
Loibl *v.* Fraser, 9 T. L. R. 534 ..... 6, 161
London, &c. Co. *v.* Field, 16 Ch. D. 645; 50 L. J. Ch. 549; 44 L. T. 444 358
London Corporation *v.* Riggs, 13 Ch. D. 798; 49 L. J. Ch. 297; 42 L. T. 580; 28 W. R. 610 123
London, Mayor of, Ex parte 590
London & N. W. Rail. Co. *v.* Garrett, L. R. 9 Eq. 26 358
London & N. W. R. Co. *v.* MacMichael, 5 Ex. 128 325
London & S. W. Rail. Co. *v.* Flower, L. R. 1 C. P. D. 77; 45 L. J. C. P. 54 353
London & S. W. Rail. Co. *v.* Gomm, 20 Ch. D. 562; 51 L. J. Ch. 530; 46 L. T. 549; 30 W. R. 620 ..... 23, 133, 185, 345
London & Yorkshire Bank *v.* Belton, 15 Q. B. D. 547 378
London Bridge, Re, 13 Sim. 176 161
London Land Co. *v.* Harris, 13 Q. B. D. 540; 53 L. J. Q. B. 536; 51 L. T. 296; 33 W. R. 14 56
Long *v.* Clarke, 13 Law Notes, 7 350
Long *v.* Gardner, 67 L. T. 552; 41 W. R. 203 506
Longden *v.* Simson, 12 Ves. 295 436
Lovejoy *v.* Carter, 35 Beav. 149 486
Lowe *v.* Bouverie, (1891) 3 Ch. 82 213
Lowther *v.* Bentinck, 19 Eq. 167; 44 L. J. Ch. 197; 31 L. T. 719; 23 W. R. 156 404
Lucas *v.* Williams, 3 Giff. 150; 8 Jur. N. S. 207 501
Luker *v.* Dennis, 7 Ch. D. 227; 47 L. J. Ch. 174; 37 L. T. 827; 26 W. R. 167 ..... 184, 345, 358
Lulham, Re, 53 L. J. Ch. 928; 51 L. T. N. S. 564 473
Lumley *v.* Simmons, 34 Ch. D. 698; 56 L. J. Ch. 329; 56 L. T. 134; 35 W. R. 422 ..... 306, 307
Lunder (Lander) & Bagley's Contracts, (1892) 3 Ch. D. 41 346
Lusty, Ex parte, 60 L. T. 160; 37 W. R. 304 296
Luxford *v.* Cheek, 3 Lev. 125 510
Lyde *v.* Russel, 1. B. & A. 394 374
Lyle *v.* Earl of Yarborough, John 70 128
Lynes, Hannah, Re, (1893) 2 Q. B. 113; 66 L. J. 372; 68 L. T. 739; 41 W. R. 488 390
Lyon *v.* Greenbow, 8 T. L. R. 457 352
Lyon *v.* Reade, 13 M. & W. 185; 13 L. J. Ex. 377 108

PAGE
Lyon *v.* Reed, 13 M. & W. 185; 13 L. J. Ex. 377 371
Lyons *v.* Tucker, 7 Q. B. D. 523 301
Lysaght *v.* Edwards, 2 Ch. D. 507 69
Lytton's (Bulwer) Will, Re, 38 Ch. D. 20; 57 L. J. Ch. 340; 36 W. R. 420 424

M.

Macdonald *v.* Brice, 2 Keene, 276 524
Macdonald *v.* Irvine, 8 C. D. 101 525
Macey *v.* Gilbey, 57 L. J. Q. B. 461 308
Macgregor *v.* Macgregor, 1 De G. F. & G. 63 489
McHattie, Ex parte, Re Wood, 10 C. D. 398; 48 L. J. Bky. 26; 39 L. T. 373; 27 W. R. 327 312
Mackay *v.* Douglas, 14 Eq. 106; 41 L. J. Ch. 539; 26 L. T. 721; 20 W. R. 652 475
Mackenzie *v.* Childers, 43 C. D. 265; 62 L. T. 98 ..... 185, 359
Mackreth *v.* Symmons, 1 L. C. Eq. 299 76
Macleay, Re, L. R. 10 Eq. 186 514
McManus *v.* Cooke, 35 C. D. 681; 56 L. J. Ch. 662; 56 L. T. 900 65
Macoubrey *v.* Jones, 2 K. & S. 684 433
McPherson *v.* Watt, 3 App. Cas. 254 19
Maddison *v.* Alderson, 8 App. Cas. 474 65
Madell *v.* Thomas & Co., 64 L. T. 9; (1891) 1 Q. B. 230; 60 L. J. Q. B. 227; 39 W. R. 280 293
Mahon and Sayer, Re, (1893) 1 Ch. 507; 62 L. J. Ch. 448; 68 L. T. 189; 41 W. N. 257 592
Malcolm *v.* Martin, 3 Bro. C. C. 501 488
Manchester Bonded Warehouse Co. *v.* Carr, 5 C. P. D. 507; 49 L. J. C. P. 809; 43 L. T. 476; 29 W. R. 354 341
Mander *v.* Harris, 27 C. D. 166; 52 L. J. Ch. 680; 51 L. T. 380; 32 W. R. 941 485
Manfield *v.* Dugard, 1 Eq. Ca. Abr. 194, pl. 4 509
Manning *v.* Chambers, 1 De G. M. & S. 282 401
Mannox *v.* Greener, L. R. 14 Eq. 456; 27 L. T. 408 ..... 492, 529
Mansel's Settled Estates, Re, W. N. (1884) 209 444
Mansfield, Re, 1 No. Cases, 364 537
Manson *v.* Thacker, 7 C. D. 629; 38 L. T. 203; 26 W. R. 604 ..... 49, 50
Margravine of Anspach *v.* Noel, 11 Mad. 310 136
Marine Mansions Co., Re, L. R. 4 Eq. 601; 37 L. J. Ch. 113 316
Marlborough's Settlement, Re, 32 C. D. 1; 55 L. J. Ch. 339; 54 L. T. 914 461
Marples *v.* Hartley, 3 E. & E. 610 314
Marquis of Antrim *v.* Duke of Buckingham, 1 Ab. Eq. 242 567
Marquis of Aylesbury *v.* Lord Iveagh, (1893) 2 Ch. 345; 62 L. J. Ch. 713; 69 L. T. 101; 41 W. R. 644 ..... 439, 444, 450
Marquis of Hertford *v.* Lowther, 7 Beav. 1 504
Marsden *v.* Meadows, 7 Q. B. D. 80; 50 L. J. Q. B. 536; 29 W. R. 816 293
Marsh's Estate, Re, 27 Ch. D. 166; 52 L. J. Ch. 680; 51 L. T. 380; 32 W. R. 941 485

PAGE
Marsh *v.* Curteys, Cro. Eliz. 528 370
Marsh *v.* Lee, 1 L. C. Eq. 659 ..... 234, 235
Marsh and Granville, Re, 24 C. D. 11; 53 L. J. Ch. 81; 48 L. T. 947 ..... 47, 55
Marshall *v.* Berridge, 19 C. D. 233; 51 L. J. Ch. 329; 45 L. T. 595; 30 W. R. 94 336
Marshall *v.* Cave, 3 L. J. Ch. 57 289
Marshall *v.* Green, 1 C. P. D. 35 61
Marshfield *v.* Hutchings, L. R. 34 Ch. D. 721 241
Marten, Re, 41 C. D. 381; 60 L. T. 555; 58 L. J. Ch. 478; 37 W. R. 497 591
Martin *v.* Holgate, L. R. 1 H. L. 175; 35 L. J. Ch. 719; 15 W. R. 135 ..... 489, 522
Martin *v.* Pyecroft, 2 De G. M. & G. 785 59
Martin *v.* Spicer, 32 C. D. 592 185
Martyn *v.* Clue, 18 Q. B. 661 344
Mason *v.* Mason, 10 Law Notes, 269 524
Massey *v.* Nanney, 2 Bing. N. C. 478 224
Master *v.* Hansard, 4 C. D. 718; 46 L. J. Ch. 505; 36 L. T. 535; 25 W. R. 570 ..... 184, 358
Masters and Beyfus, Re, 39 Ch. D. 116 50
Matthews *v.* Buchanan, 5 Times, 373 312
Matthews *v.* Paul, 3 Sw. 328 433
Maundrell *v.* Maundrell, 10 Ves. 246 159
Mawe *v.* Hindmarsh, 28 L. T. 644 346
Maxim-Nordenfeldt Gun and Ammunition Co. *v.* Nordenfeldt 216
Maxton, Re, 4 Jur. 407 490
Mayer and Fielder *v.* Middlewick, 59 L. T. 400 309
Mayfield *v.* Burton, L. R. 17 Eq. 15; 43 L. J. Ch. 46; 29 L. T. 571; 22 W. R. 148 133
Meek *v.* Bayliss, 31 L. J. Ch. 448 187
Meek *v.* Chamberlain, 8 Q. B. D. 31; 51 L. J. Q. B. 99; 46 L. T. 344; 30 W. R. 228 247
Melville *v.* Stringer, 13 Q. B. D. 392; 53 L. J. Ch. 178; 50 L. T. 531; 32 W. R. 890 305
Mence *v.* Mence, 18 Ves. 350 534
Menzies *v.* Menzies, W. N. (1893) 48 566
Merchant Taylors' Co., Re, 30 C. D. 28 ..... 582, 590
Merrick, Re, L. R. 1 Eq. 418; 35 L. J. Ch. 418; 14 L. T. 130; 14 W. R. 473 522
Merril *v.* Frame, 4 Taunt. 329 ..... 342, 361
Merton *v.* Bown (Bower), 11 L. N. 172 307
Mester *v.* Garland, 5 Sim. 205 401
Metcalfe *v.* Metcalfe, 36 W. R. 137 ..... 516, 587, 588
Meux *v.* Bell, 1 Hare, 73 212
Middleton *v.* Magnay, 2 H. & N. 236 ..... 72, 75
Miles *v.* Knight, 17 L. J. Ch. 458 109
Millard *v.* Bailey, L. R. 1 Eq. 378; 35 L. J. Ch. 312; 13 L. T. 751; 14 W. R. 272 503
Millbank *v.* Vane, (1893) 3 Ch. 79; 62 L. J. Ch. 629; 68 L. T. 735 562

PAGE
Miller *v.* Tebb, 9 T. L. R. 515 350
Millett *v.* Davey, 31 Beav. 470 288
Millner, Re, L. R. 14 Eq. 245 ; 42 L. J. Ch. 44 ; 26 L. T. 825 ; 20 W. R. 823 109
Mills, Re, 37 C. D. 312 ; 57 L. J. Ch. 466 ; 58 L. T. 620 ; 36 W. R. 343 528
Mills' Trusts, Re, W. N. (1888) 253 ..... 129, 281
Mills *v.* Charlesworth, 59 L. J. Q. B. 530 ; 39 W. R. 1 293
Mills *v.* Haywood, 6 C. D. 106 74
Milne *v.* Gilbert, 5 De G. M. & G. 510 490
Milroy *v.* Lord, 4 De G. F. & J. 264 ..... 478, 479
Minet *v.* Leman, 20 Beav. 269 84
Mitchell's Trusts, Re, L. R. 9 C. D. 5 395
Mitchell *v.* Fordham, 6 B. & C. 274 351
Mitchell *v.* Gard, 3 S. & T. 80 483
Mitchell *v.* Reynolds, 1 S. L. C. 416 216
Mœnick *v.* Feneste, 61 L. J. Ch. 737 ; 67 L. T. 602 216
Mogg *v.* Mogg, 1 Mer. 654 487
Moggridge *v.* Clapp, (1892) 3 Ch. 382 ; 67 L. T. 150 ; 61 L. J. Ch. 534 ; 40 W. R. 663 ..... 441, 451
Mole *v.* Smith, 1 J. & W. 665 159
Monetary Advance Co., Re, 20 Q. B. D. 785 ; 57 L. J. Q. B. 463 308
Monkton and Gilzean, Re, 27 C. D. 555 ; 51 L. T. 320 ; 32 W. R. 973 .. 43
Monro *v.* Taylor, 8 Hare, 60 66
Montague *v.* Sandwich, 33 Beav. 324 493
Montague, Re, Scott *v.* Baker 591
Moody and Yates, Re, 30 C. D. 314 ; 54 L. J. Ch. 886 ; 53 L. T. 845 ; 33 W. R. 785 ..... 53, 107
Moore, Re, 8 C. D. 218 ; 39 L. T. 1 ; 26 W. R. 843 215
Moore *v.* Frowd, 3. M & C. 45 416
Moore *v.* Johnson, (1891) 3 Ch. 48 ; 60 L. J. Ch. 499 ; 64 L. T. 696 ; 39 W. R. 509 398
Moore *v.* Paine, 2 Lee, 595 443
Moore *v.* Painter, 6 Jur. 903 288
Morewood *v.* South Yorkshire Co., 28 L. J. Ex. 114 313
Morgan, Ex parte, 22 Q. B. D. 592 ; 58 L. T. 713 165
Morgan *v.* Gronow, L. R. 16 Eq. 1 ; 42 L. J. Ex. 152 ; 28 L. T. 434 .. 571
Morgan *v.* Minet, 6 C. D. 645 19
Morgan *v.* Swansea Sanitary Authority, 9 C. D. 582 ; 27 W. R. 283 .. 69
Morgan *v.* Thomas, 8 Ex. Reps. 302 197
Morley *v.* Loughman, (1892) 1 Ch. 736 19
Morrice *v.* Aylmer, L. R. 7 H. L. 717 ; 24 W. R. 587 495
Morris *v.* De Flobbel Flipo, (1892) 2 Ch. 352 ; 61 L. J. Ch. 518 294
Morris *v.* Mercer (a Vacation case, unreported) 255
Morris *v.* Morris, 15 Sim. 505 530
Morrison, Ex parte, 42 L. T. 158 ; 28 W. R. 524 317
Morrison *v.* Chadwick, 7 C. B. 283 362
Morrit, Re, 18 Q. B. D. 222 ; 56 L. J. Q. B. 139 ; 56 L. T. 42 ; 35 W. R. 277 ..... 254, 306
Morse *v.* White, 3 C. D. 763 527

PAGE
Morshead's Settled Estates, Re, W. N. (1894) 180 440
Mortimer *v.* Bell, L. R. 1 Ch. Ap. 10; 35 L. J. Ch. 25; 13 L. T. 348; 14 W. R. 68 58
Morton *v.* Hallett, 15 C. D. 143; 49 L. J. Ch. 559; 42 L. T. 443; 28 W. R. 895 408
Morton *v.* Woods, L. R. 4 Q. B. 293; 38 L. J. Q. B. 81 ..... 165, 265
Moseley, Re, L. R. 11 Eq. 499; 21 L. T. 384; 18 W. R. 126 524
Moss *v.* Gallimore, 1 Doug. 279 381
Moss *v.* James, 47 L. J. Q. B. 160; 38 L. T. 595 371
Moule *v.* Garrett, L. R. 7 Ex. 101; 41 L. J. Ex. 62; 26 L. T. 376; 20 W. R. 416 ..... 183, 209
Moulton *v.* Camroux, 4 Ex. 17 ..... 2, 326
Moxhay *v.* Inderwick, 1 De G. & S. 708 182
Mumford *v.* Collyer, 25 Q. B. D. 279; 38 W. R. 716 264
Munday's Settled Estates, Re, 63 L. T. 311 ..... 439, 457
Municipal, &c. Building Society *v.* Smith, 37 W. R. 42 263
Murray *v.* McKenzie, L. R. 10 C. P. 625; 44 L. J. C. P. 313; 32 L. T. 777; 23 W. R. 595 ..... 312, 313
Mutual Life Assurance Co. *v.* Langley, 26 C. D. 686; 53 L. J. Ch. 996; 51 L. T. 284; 32 W. R. 292 213
Myers *v.* Elliot, 16 Q. B. D. 526; 55 L. J. Q. B. 233; 54 L. T. 553; 34 W. R. 338 ..... 305, 307

N.

Nanney *v.* Morgan, 35 Ch. D. 598; 56 L. J. Ch. 805; 57 L. T. 48; 35 W. R. 713 479
Nash *v.* Palmer, 5 M. & S. 374 361
Nasher *v.* Ashton, Sir T. Jones, 195 181
National Bank, Ex parte, Re Haynes, 15 Ch. D. 142; 49 L. J. Bkcy. 62; 43 L. T. 36; 28 W. R. 848 300
National Mercantile Bank, Ex parte, Re Haynes 310, 311, 312
Needham *v.* Johnson, 8 B. & S. 190; 15 L. T. 467; 15 W. R. 346 314
Nelson *v.* Booth, 3 De G. & J. 119; 27 L. J. Ch. 782 289
Nelthorpe *v.* Holgate, 1 Coll. 203 43
Nepean *v.* Doe, 4 M. & W. 494 109
Nesbitt *v.* Meyer, 1 Sw. 226 ..... 72, 336
Neville *v.* Snelling, 15 Ch. D. 679; 49 L. J. Ch. 777; 43 L. T. 244; 29 W. R. 375 169
New Land Development Association *v.* (and) Gray, (1892) 2 Ch. 138; 61 L. J. Ch. 495; 66 L. T. 694; 40 W. R. 551 ..... 152, 153
Newbould *v.* Bailward, 36 W. R. 161; 57 L. J. Q. B. 41 591
Newcastle, The Duke of, Re, 24 Ch. D. 128; 31 W. R. 782 ..... 145, 325, 438
Newham *v.* May, 13 Pri. 749 31
Newitt, Ex parte, Re Garraud, 16 Ch. D. 522; 44 L. T. 5; 29 W. R. 344 293

PAGE
Newman *v.* Rusham, 17 Q. B. 723; 21 L. J. Q. B. 136; 16 Jur. 359.. 473
Newman v. Warner, 1 Sim. N. S. 457 421
Newstead *v.* Searles, 1 Atk. 264 471
Newton's Settled Estates, Re, W. N. (1889) 201; W. N. (1890) 24..456, 457
Newton *v.* Newton, 5 L. T. 218 419
Nicholl *v.* Fenning (Fleming), 19 Ch. D. 258; 51 L. J. Ch. 166; 45 L. T. 378; 30 W. R. 95 ..... 184, 358
Nicholls *v.* Atherstone, 10 Q. B. 744; 16 L. J. Q. B. 371 375
Nicholls *v.* Hawkes, 10 Hare, 342; 22 L. J. Ch. 255 529
Nicholson *v.* Field, (1893) 2 Ch. 511; 62 L. J. Ch. 1015; 69 L. T. 299; 42 W. R. 48 419
Nind *v.* The Nineteenth Century Building Society, W. N. (1894) 6 367
Noel *v.* Ward, 1 Madd. 322 137
North British Co. *v.* Hallett, 9 W. R. 880 213
North Central Waggon Co. *v.* M. S. & L. Rail. Co. 293
North London Land Co. *v.* Jacques, 49 L. T. 659; W. N. (1888) 182 .. 365
Northey *v.* Paxton, 60 L. T. 30 494
Nottingham Patent Brick Co. *v.* Butler, 15 Q. B. D. 261; 54 L. J. Q. B. 545 ..... 104, 184, 185, 359

O.

Oastler *v.* Henderson, 46 L. J. Q. B. 607 371
Oates *v.* Frith, Hob. 130 339
Occleston *v.* Fullalove, L. R. 9 Ch. Ap. 147; 43 L. J. Ch. 297; 29 L. T. 785; 22 W. R. 305 486
Odell, Ex parte, 10 Ch. D. 76; 48 L. J. Bkcy. 1; 39 L. T. 333; 27 W. R. 274 293
Official Receiver *v.* Tailby, 18 Q. B. D. 25; 56 L. J. Q. B. 30; 55 L. T. 626; 35 W. R. 91 296
Oldham *v.* Stringer, 51 L. T. 695; 33 W. R. 251 ..... 250, 275
Olding, Re, 2 Curt. 865 536
Oliphant *v.* Gerard, 58 L. T. 800 395
Oliver *v.* Hunting, 44 Ch. D. 205 63
O'Mahoney *v.* Burdett, L. R. 7 H. L. 388 521
Olney *v.* Balis (Bates), 3 Dr. 319 520
Onn *v.* Fisher, 5 T. L. R. 504 308
Onward Benefit Society *v.* Smithson, (1893) 1 Ch. 1 165
Oppenheim *v.* Schweder, (1891) 3 C. 44; 60 L. J. Ch. 656; 65 L. T. 64; 39 W. R. 588 519
Orme, Ex parte, 38 L. T. 328 293
Ormerod's Settled Estate, Re, (1892) 2 Ch. 318; 61 L. J. Ch. 651; 66 L. T. 845; 40 W. R. 490 458
Otley *v.* Maning, 9 East, 59 473

P.

Page *v.* Midland Rail. Co., W. N. (1893) 161 ..... 166, 182
Page *v.* Norfolk, 13 L. N. 41 64

PAGE
Paget's Settled Estates, Re, 30 Ch. D. 161; 55 L. J. Ch. 42; 53 L. T. 90; 33 W. R. 898 ..... 441, 445
Paget *v.* Foley, 2 Bing. N. C. 679 348
Paine *v.* Miller, 6 Ves. 349 67
Palin *v.* Hill, 1 M. & K. 470 490
Palliser *v.* Gurney, 19 Q. B. D. 519; 56 L. J. Q. B. 546; 35 W. R. 760; 51 J. P. 520 ..... 6, 161, 389
Palmer, Re, 45 C. D. 211; 62 L. T. 778; 38 W. R. 673 592
Palmer *v.* Answorth, (1893) 3 Ch. 369; 62 L. J. Ch. 988; 69 L. T. 477; 42 W. R. 151 533
Palmer *v.* Earith, 14 M. & W. 428; 14 L. J. Ex. 256 ..... 340, 351
Palmer *v.* Hendrie, 27 Beavan, 349 286
Palmer *v.* Johnson, 13 Q. B. D. 351; 53 L. J. Q. B. 548; 51 L. T. 211; 33 W. R. 36 31
Pannell *v.* Steadman, 12 Q. B. D. 104 472
Pappillon *v.* Brunton, 5 H. & N. 518; 29 L. J. Ex. 265 373
Paradine *v.* Jones, Alleyne, 26 362
Pares, Re, 12 Ch. D. 333 565
Parish *v.* Sleeman, 1 De G. F. & J. 326 ..... 340, 351
Parker's Trusts, Re, W. N. (1894) 14 419
Parker, Re, L. R. 1 P. & D. 301; 36 L. J. P. & M. 6; 15 L. T. 248; 15 W. R. 262 ..... 511, 531
Parker *v.* Hodgson, 1 D. & S. 568 510
Parker *v.* Housefield, 2 M. & K. 419 275
Parker *v.* Taswell, 27 L. J. Ch. 812; 31 L. T. 226; 6 W. R. 608 72
Parnell, Re, L. R. 2 P. & M. 379; 41 L. J. Prob. 35; 26 L. T. 744; 20 W. R. 494 533
Parr *v.* Lovegrove, 4 Drew. 182 194
Parry *v.* Hindle, 2 Taunt. 181 327
Parsons and Furber, Re, (1893) 2 Q. B. 122; 62 L. J. Q. B. 365; 68 L. T. 767, 777; 41 W. R. 468 316
Parsons *v.* Brand, 25 Q. B. D. 110; 62 L. T. 479; 38 W. R. 388 304
Parsons *v.* Hargrave, 17 Q. B. D. 336; 55 L. J. Q. B. 408; 34 W. R. 717 308
Partington *v.* Allen, 57 L. T. 654 230
Pass *v.* Dundas, 29 W. R. 332 416
Patch *v.* Ward, L. R. 1 Eq. 436 137
Patch *v.* Wild, 30 Beav. 99 289
Patman *v.* Harland, 17 Ch. D. 353; 50 L. J. Ch. 642 .. 105, 133, 183, 184, 345
Paul *v.* Paul, 20 Ch. D. 742; 30 W. R. 801 ..... 471, 476
Pawlett *v.* Pawlett, Tudor's Con. Cases 434, 510
Pawson *v.* Brown, 13 Ch. D. 202; 49 L. J. Ch. 193; 42 L. T. 339; 28 W. R. 652 400
Payler *v.* Homersham, 4 M. & S. 423 561
Payne, Ex parte, Re Coton, 56 L. T. 571; 35 W. R. 476 307
Peacock *v.* Peacock, 16 Ves. 50 540
Pearls *v.* Saalfield, (1892) 2 Ch. 149; 66 L. T. 666; 61 L. J. Ch. 409; 40 W. R. 548 216
Pearson, Re, 26 L. T. 293; 20 W. R. 522 475

PAGE
Pearson *v.* Pearson, L. R. 2 P. & D. 451; 40 L. J. Prob. 53; 24 L. T. 917; 19 W. R. 1014 ..... 215, 541
Pearson *v.* Spencer, 3 B. & S. 761; 8 L. T. 166; 11 W. R. 471 174
Pease *v.* Coates, L. R. 2 Eq. 688; 36 L. J. Ch. 57; 14 L. T. 886; 14 W. R. 1021 358
Peck *v.* The London School Board, (1893) 2 Ch. 315; 62 L. J. Ch. 598; 68 L. T. 847 173
Pellatt *v.* Boosey, 31 L. J. C. P. 281 370
Pember *v.* Mathers, 1 Bro. C. C. 52 209
Pemberton *v.* Barnes, L. R. 6 Ch. Ap. 685 87
Penniall *v.* Harborne, 11 Q. B. 368; 17 L. J. Q. B. 94 356
Pennington, Re, Ex parte Cooper, 59 L. T. 774 472
Penrose *v.* Manning, 63 L. T. 159 485
Penton *v.* Robart, 2 East, 90 374
Penwarden *v.* Roberts, 9 Q. B. D. 137; 51 L. J. Q. B. 312; 16 L. T. 361; 30 W. R. 427 300
Perriam *v.* Perriam, 49 L. T. 710; 32 W. R. 369 50
Peters *v.* East Grinstead Rail. Co., 18 Ch. D. 429; 50 L. J. Ch. 839; 45 L. T. 234; 29 W. R. 875 571
Pethybridge *v.* Burrow, W. N. (1884) p. 127 479
Phillips, Re, 34 Ch. D. 467; 56 L. J. Ch. 337; 56 L. T. 144; 35 W. R. 284 398
Phillips *v.* Cayley, 58 L. J. Ch. 869; 61 L. T. 195 ..... 92, 528, 572
Phillips *v.* Henson, 3 C. P. D. 26; 50 L. J. Ch. 839; 45 L. T. 234; 29 W. R. 875 349
Phillips *v.* Low, (1892) 1 Ch. 47 174
Phillips *v.* Mullings, L. R. 7 Ch. Ap. 244; 41 L. J. Ch. 211; 20 W. R. 129 477
Philpot *v.* Hoare, Amb. 480 209
Pickard *v.* Marriage, 1 Ex. D. 364; 45 L. J. Ex. 594; 24 W. R. 886 ..... 311, 313, 317
Pidcock (Peacock) *v.* Frigout, W. N. (1892) 157 571
Pidgely *v.* Pidgely, 1 ~~Cole~~ 255 528
Pierce *v.* Harrison, 25 L. T. 264 498
Piggot's Case, 11 Rep. 47 110
Piggot *v.* Garnish, Cro. Eliz. 678 324
Pike *v.* Eyre, 9 B. & C. 909 334
Pindar *v.* Ainsley, 1 T. R. 312 347
Pini *v.* Roncoroni, (1892) 1 Ch. 633; 61 L. J. Ch. 218; 66 L. T. 255; 40 W. R. 297 545
Pinnock *v.* Bailey, 23 Ch. D. 497; 52 L. J. Ch. 880; 48 L. T. 811; 31 W. R. 912 212
Pitman *v.* Holborrow, (1891) 1 Ch. 707; 64 L. T. 447; 60 L. J. Ch. 279; 39 W. R. 537 515
Pitt's Settlement, Re, W. N. (1884) p. 225, 242 404
Pocock *v.* Reddington, 5 Ves. 734 230
Pollard *v.* Steward, 7 L. N. 138 243
Pomfret *v.* Ricroft, 1 Wms. Saund. 321 362
Poole's Case, 1 Salk. 368 374
Poole *v.* Hill, 6 M. & W. 835 73
Pooley, Re, 40 Ch. D. 1; 58 L. J. Ch. 1; 60 L. T. 73; 37 W. R. 17 417

PAGE
Pooley *v.* Goodwin, 4 A. & E. 94; 1 H. & W. 537 225
Pope, Re, 17 Q. B. D. 743; 55 L. J. Q. B. 522; 55 L. T. 268, 369; 34 W. R. 654, 693 146
Portal and Lamb, Re, 30 Ch. D. 50; 54 L. J. Ch. 1013; 51 L. T. 514; 34 W. R. 65 498
Porter *v.* Baddley, 5 Ch. D. 592 525
Portland (Duke of) *v.* Hill, L. R. 2 Eq. 765 102
Postlethwaite *v.* Rickman, 60 L. T. 514; 37 W. R. 200 20
Potter, Re, L. R. 7 Eq. 484 ..... 398, 480
Potter *v.* Inland Revenue Commissioners, 10 Ex. D. 147; 23 L. J. Ex. 345 224
Potts *v.* Smith, L. R. 6 Eq. 311 362
Poulett (Earl) *v.* Hood, L. R. 5 Eq. 115 181
Pow *v.* Davis, 30 L. J. Q. B. 257; 4 L. T. 399; 9 W. R. 611 329
Powell, Re, 4 N. C. 391 493
Powell *v.* Boggis, 35 Beav. 535 490
Powers, Re, Lindsell *v.* Phillips, 30 Ch. D. 291; 53 L. T. 647 241
Powys *v.* Mansfield, 2 M. & C. 359 506
Pratt, Ex parte, Re Field, 63 L. T. 289 302
Pratt *v.* Matthew, 22 Beav. 328; 25 L. J. Ch. 409; 20 Jur. 364; 4 W. R. 418 407
Prattle (Pattle) *v.* Anstruther, 65 L. T. 175; 41 W. R. 625 63
Price, Re, Stafford *v.* Stafford, 7 Q. B. D. 129; 25 L. T. N. S. 572 498
Price *v.* Berrington, 42 C. D. 372; 61 L. T. 537; 37 W. R. 785 3
Price *v.* Jenkins, 5 C. D. 619 473
Price *v.* Page, 4 Ves. 680 484
Price *v.* Wormwood, 4 H. & N. 512 370
Proale *v.* Soady, 37 L. J. Ch. 246; 16 W. R. 445 213
Propert *v.* Barker, 1 R. & M. 625 346
Proudfoot *v.* Hart, 25 Q. B. D. 42; 63 L. T. 171; 38 W. R. 730 354
Prytherch *v.* Williams, 42 Ch. D. 590, 602 259
Pugh *v.* Arton, 8 Eq. 626; 38 L. J. Ch. 619; 20 L. T. 865 374
Pugh *v.* Leeds (Duke of), Cowp. 714 337
Pulbrook *v.* Ashby, 56 L. J. Q. B. 376 ..... 292, 294, 355
Pulsford *v.* Richards, 17 Beav. 94; 22 L. J. Ch. 559 29
Punnett, Ex parte, 16 Ch. D. 226; 50 L. J. Ch. 212; 44 L. T. 226; 29 W. R. 124 ..... 264, 265
Purssell and Deakin's Contracts, Re, W. N. (1893) 152 ..... 35, 188
Pybus, Re, 35 Ch. D. 568; 35 W. R. 770; 56 L. J. Ch. 921; 57 L. T. 362 590
Pye, Ex parte, 18 Ves. 150 517
Pym *v.* Lockyer, 5 M. & C. 29 516

Q.

Quilter *v.* Mapleson, 9 Q. B. D. 672; 52 L. J. Q. B. 44 365

R.

PAGE

R. *v.* Aylesbury, 9 Q. B. 261 351
R. *v.* Hall, 9 A. & E. 339 327
R. *v.* Holt, 24 Q. B. D. 178; 59 L. J. Q. B. 113; 62 L. T. 117; 38 W. R. 236 151
R. *v.* Lexdale, 1 Burr. 145 418
R. *v.* St. Dunstan, 4 B. & C. 686 374
Radnor (Earl of), Re, 45 Ch. D. 402 448
Raggett, Re, Ex parte Williams, 50 L. J. Ch. 187; 16 Ch. D. 117; 29 W. R. 314; 44 L. T. 4 237
Raikes *v.* Summers (Simmons), 12 L. N. 205 371
Rakestraw *v.* Brewer, 2 P. W. 511 269
Rammel *v.* Gillow, 9 Jur. 704 522
Ramsay *v.* Gilchrist, (1892) A. C. 412; 61 L. J. P. C. 72; 66 L. T. 806 ..... 115, 167, 473
Ramsden *v.* Hylton, 2 Ves. 305 561
Ransome *v.* Burgess, L. R. 3 Eq. 773; 36 L. J. Ch. 84; 15 W. R. 189 .. 406
Rapley *v.* Grant, W. N. (1894) 2 357
Ravald *v.* Russell, Younge, 9 248
Rawlings, Ex parte, 22 Q. B. D. 193; 37 W. R. 203; 60 L. T. 157; 56 L. J. Q. B. 197 ..... 293, 530
Rawlins, Re, (1892) App. Cas. 342 530
Rawlins *v.* Biggs, 3 C. P. D. 368; 27 W. R. 138 352
Ray's Settled Estates, Re, 25 Ch. D. 464; 53 L. J. Ch. 1051; 51 L. T. 80; 32 W. R. 458 448
Rayner *v.* Preston, 18 Ch. D. 1; 50 L. J. Ch. 472; 44 L. T. 787; 29 W. R. 547 ..... 36, 67
Raynolls *v.* Woolmer 181
Read *v.* Joannon, 25 Q. B. D. 300; 63 L. T. 387; 38 W. R. 734 294
Reading's Settlement, Re 528
Real, &c. Advance Co. *v.* Clears, W. N. (1888), p. 6 308
Reddell *v.* Errington, 26 C. D. 220 470
Rede *v.* Farr, 6 M. & S. 121 364
Redgrave *v.* Hurd, 20 C. D. 1 27
Reece *v.* Straysberg, 54 L. T. 133 287
Reeves *v.* Barlow, 11 Q. B. D. 610 294
Reg. *v.* Holt, 24 Q. B. D. 178; 59 L. J. Q. B. 113; 62 L. T. 117; 38 W. R. 236 151
Reg. *v.* Lord Truro, 21 Q. B. D. 555 ..... 142, 143, 208
Regent's Canal Co. *v.* Ware, 23 Beav. 575; 26 L. J. Ch. 566 44
Reid *v.* Reid, 31 Ch. D. 402; 55 L. J. Ch. 294; 54 L. T. 100 .. 7, 10, 214, 388
Reilly *v.* Booth, 44 C. D. 12; 62 L. T. 378; 38 W. R. 484 171
Renaud *v.* Tourangeau, L. R. 2 P. C. 4; 37 L. J. Prob. 1 514
Rendall *v.* Andrae, 61 L. J. Q. B. 630 209
Rennals *v.* Cowlinshaw, 11 Ch. D. 866; 48 L. J. Ch. 830; 41 L. T. 116; 28 W. R. 9 184
Renner *v.* Toller (Tolley), 68 L. T. 815; W. N. (1893) 90 54

PAGE
Rex *v.* Lexdale, 1 Burr. 448 418
Reynolds, Re, 3 Ch. D. 61; 24 W. R. 991 566
Reynolds *v.* Whelan, 16 L. J. Ch. 434 482
Rhodes *v.* Bate, L. R. 1 Ch. Ap. 252; 35 L. J. Ch. 267; 12 Jur. 178; 13 L. T. 778; 14 W. R. 292 561
Rhodes *v.* Muswell Hill Co., 29 Beav. 560; 30 L. J. Ch. 509; 7 Jur. 178; 4 L. T. 229; 9 W. R. 472 517
Rhodes *v.* Rhodes, L. R. 36 Ch. D. 586; 56 L. J. Ch. 825 109
Rice *v.* Gordon, 11 Beav. 265 168
Rice *v.* Rice, 2 Drew. 73; 23 L. J. Ch. 289; 22 L. T. 208; 2 W. R. 139 76
Richards *v.* Delbridge, 18 Eq. 11; 43 L. J. Ch. 459; 22 W. R. 584 478
Richards *v.* Humber, 45 Ch. D. 589 212
Richards *v.* Revitt, 7 Ch. D. 224; 47 L. J. Ch. 472 358
Richards *v.* Rose, 9 Ex. 219; 23 L. J. Ex. 3 174
Richardson *v.* Harris, 22 Q. B. D. 268; 37 W. R. 426 310
Rider *v.* Wager, 2 P. Wms. 190 521
Ridgeway *v.* Morton, 6 H. L. Ca. 292 ..... 75, 329
Ridgway *v.* Wharton, 6 H. L. Ca. 238; 27 L. J. Ch. 46; 4 Jur. 173; 3 De G. M. & G. 677, 686 63
Ridler *v.* Ridler, 22 Ch. D. 74; 52 L. J. Ch. 343; 48 L. T. 396; 31 W. R. 93 473
Rigge *v.* Bell, 2 S. L. C. 100 334
Riley *v.* Streatfield, 34 Ch. D. 386; 56 L. J. Ch. 442; 56 L. T. 48; 35 W. R. 470 44
Rippingall *v.* Lloyd, 2 N. & M. 410 138
Rippon *v.* Norton, 2 Beav. 63 516
River Steam Co.'s Case, 1 D. & S. 129 74
Rivett-Carnac, Re, 16 Q. B. D. 308; 55 L. J. Q. B. 74; 54 L. T. 439; 34 W. R. 421 439
Roberts, Re, 43 C. D. 52; 62 L. T. 33; 38 W. R. 225 276
Roberts, Re, Tarleton *v.* Bruton, 27 C. D. 346; 32 W. R. 986; 51 L. T. 654 522
Roberts *v.* Ackroyd, (1893) 3 Ch. D. 363; 63 L. J. Ch. 32; 69 L. T. 474 402
Roberts *v.* Roberts, 53 L. J. Ch. 313; 50 L. T. 351; 32 W. R. 605 302
Robertson, Re, 19 Q. B. D. 1; 35 W. R. 833; 56 L. T. 859 590
Robertson *v.* Armstrong, 28 Beav. 123 192
Robinson *v.* Wheelwright, 6 De G. M. & G. 535 512
Robson, Re, 45 C. D. 71; 63 L. T. 372; 38 W. R. 556 592
Rodwell *v.* Phillips, 9 M. & W. 503 61
Roe *v.* Archbishop of York, 6 East, 86 370
Roe *v.* Dorrant, 6 Bing. 574 372
Roe *v.* Ireland, 11 East, 280 114
Rogers *v.* Drury, 36 W. R. 496 216
Rogers (Rodgers) *v.* Harrison and others (1893) 1 Q. B. 161; 62 L. J. Q. B. 213; 68 L. T. 66; 41 W. R. 291; 9 T. 120 76
Rogers *v.* Maddock, (1892) 3 Ch. 346; 62 L. J. Ch. 219; 67 L. T. 329 .. 216
Rogers *v.* Rice, (1892) 2 Ch. 170; 66 L. T. 640; 61 L. J. Ch. 573; 40 W. R. 489 367
Roland *v.* Edwards 484, 498
Rolfe *v.* Flower, L. R. 1 P. C. 27 542

PAGE
Rollitt and Sons, Re, W. N. (1894) 185 276
Rolls *v.* Miller, 27 Ch. D. 71; 53 L. J. Ch. 682; 50 L. T. 597; 32 W. R. 886 357
Rolph, Ex Parte, Re Spindler, 19 Ch. D. 98; 51 L. J. Ch. 88; 45 L. T. 412; 30 W. R. 52 310
Rolt *v.* Hopkinson, 9 H. L. C. 514; 34 L. J. Ch. 468 235
Roose *v.* Chalk, 49 L. J. Ch. 625 534
Roots *v.* Snelling, 48 L. T. 216 27
Roper *v.* Doncaster, L. R. 39 Ch. D. 482; 58 L. J. Ch. 995; 58 L. T. 802; 36 W. R. 758 528
Rosher, Re, Rosher *v.* Rosher, 26 Ch. D. 71; 51 L. T. 117; 53 L. J. Ch. 722; 32 W. R. 821 514
Rossiter *v.* Miller, L. R. 3 App. Cas. 1124; 48 L. J. Ch. 10; 26 W. R. 865 63
Rousillon *v.* Rousillon, 14 Ch. D. 341 216
Routledge *v.* Dorrell, 2 Ves. jun. 347 570
Row *v.* Dawson, 2 L. C. Eq. 210
Rowe *v.* London School Board, 36 Ch. D. 619; 57 L. T. 182 71
Rowles *v.* Mason, 2 Brownlow, 197 328
Royal Bristol Permanent Society *v.* Bomash, 35 C. D. 390 71
Rudge *v.* Richens, 26 L. T. 527 286
Russel *v.* Russel, 1 Bro. C. C. 269 ..... 273, 541
Russell, Ex parte, 19 Ch. D. 588; 51 L. J. Ch. 521; 46 L. T. 113; 30 W. R. 584 475
Ryall *v.* Bowles, 2 L. C. Eq. 210

S.

S.'s Settlement, Re, W. N. (1893) 127 7
Saffery, Ex parte, 16 Ch. D. 668; 44 L. T. 324; 29 W. R. 749 317
Saffron Walden Building Co. *v.* Rayner, 14 Ch. D. 406; 49 L. J. Ch. 465; 43 L. T. 3; 28 W. R. 681 131
Sale *v.* Lambert, L. R. 18 Eq. 1; 43 L. J. Ch. 470; 22 W. R. 478 40
Salisbury *v.* Ridley, 62 L. T. 789 496
Salt *v.* Marquis of Northampton, (1892) A. C. 1; 61 L. J. Ch. 49; 65 L. T. 765; 40 W. R. 529 ..... 240, 248
Salter *v.* Kidley, 1 Show, 278 164
Salthouse *v.* Read, W. N. (1889) 26 592
Sampson and Wall, Re, 25 Ch. D. 482; 53 L. J. Ch. 457; 50 L. T. 309; 32 W. R. 617 398
Samuel *v.* Samuel, 12 C. D. 152 517
Sandbach and Edmondson, Re, (1891) 1 Ch. 99; 60 L. J. Ch. 60; 63 L. T. 797; 39 W. R. 193 47
Sanders, Re, 20 L. J. M. C. 60; 29 S. J. 340 496
Sanderson *v.* Jackson, 2 B. & P. 238 62
Sandon *v.* Hooper, 6 Beav. 246 287
Sands *to* Thompson, Re, 22 Ch. D. 614; 52 L. J. Ch. 406; 48 L. T. 210 95
Saner *v.* Bilton, 7 Ch. D. 815; 47 L. J. Ch. 267; 26 W. R. 394 .. 341, 353

PAGE
Sanson *v.* Rhodes, 6 Bing. N. C. 261 45
Sarl, Re, Ex parte Williams 302
Sartoris *v.* Sartoris, 64 L. T. 730; 60 L. J. Ch. 634 510
Satin *v.* Heap, 1 L. T. 51; 27 Beav. 553 233
Saunders *v.* Davies, L. R. 15 Q. B. D. 218 254
Saunders *v.* Saunders, 20 L. J. M. C. 60; 29 S. J. 340 378
Savile *v.* Couper, 36 Ch. D. 520; 56 L. J. Ch. 492; 56 L. T. 907; 35 W. R. 829 418
Savory *v.* Underwood, 23 L. T. 141 78
Saxby *v.* Thomas, 64 L. T. 65 40
Saxton *v.* Saxton, 13 Ch. D. 359 498
Scholes *v.* Brook, 64 L. T. 674; W. N. (1891) 16, 101 238
Schrieber *v.* Dinkel, 54 L. J. Ch. 241 473
Schwartz *v.* Lockett, 61 L. T. 719; 38 W. R. 142 ..... 339, 361
Scott *v.* Baker, In re Montague, W. N. (1889) 40 591
Scott *v.* Brown, 51 L. T. 746 365
Scott *v.* Hanbury, 1 Ch. D. 298; 63 L. T. 800; 60 L. J. Ch. 238 398
Scott *v.* Hanson, 1 R. & M. 128 27
Scott *v.* Jones, 4 C. & F. 382 500
Scott *v.* Nixon, 3 D. & W. 388 95
Scott *v.* Tyler, 2 Bro. C. C. 431 513
Scriven *v.* Sandon, 2 J. & H. 743 527
Seal *v.* Claridge, 7 Q. B. D. 516; 50 L. J. Q. B. 316; 44 L. T. 501; 29 W. R. 598 ..... 300, 318
Sear *v.* House Property, &c. Co., 16 Ch. D. 387; 50 L. J. Ch. 77; 43 L. T. 531; 29 W. R. 192 360
Seaton *v.* Seaton, W. N. (1888) 44 398
Seed *v.* Bradley, W. N. (1894) 2 ..... 297, 299, 305, 306
Selwyn *v.* Garfit, 38 C. D. 273; 56 L. T. 233; 36 W. R. 513 257
Seroka *v.* Kattenburg, 17 Q. B. D. 177; 55 L. J. Ch. 569; 54 L. T. 649; 34 W. R. 542 390
Seton *v.* Slade, 7 Ves. 265 75
Severn *v.* Clerk, 1 Leon. 122 165
Shadlow *v.* Cotterell, 20 Ch. D. 90 40
Shafto's Trusts, Re, 29 Ch. D. 247; 54 L. J. Ch. 885; 53 L. T. 261; 33 W. R. 728 418
Sharp *v.* Birch, 8 Q. B. D. 111; 51 L. J. Q. B. 74; 45 L. T. 760; 30 W. R. 428 313
Sharpe *v.* Millington, 23 Beav. 419 346
Shaw *v.* Johnson, 1 D. & S. 412 128
Shaw *v.* Kay, 1 Ex. 412 337
Shaw *v.* Nicholl, 2 Curt. 865 536
Shaw *v.* Stenton, 2 H. & N. 858; 27 L. J. Ex. 253 362
Shepherd *v.* Gilmore, 57 L. J. Ch. 6 185
Sheppard *v.* Wilson, 4 Ha. 392 434
Shields *v.* Rice, 3 Jur. 950 126
Shurmur *v.* Sedgwick, 24 Ch. D. 597; 53 L. J. Ch. 87; 49 L. T. 156; 31 W. R. 884 473
Sichel *v.* Monsenthal, 30 Beav. 371 239
Sidebottom *v.* Barrington, 3 Beav. 524 4

PAGE

Simmons *v.* Woodward, (1892) A. C. 100; 61 L. J. Ch. 252; 66 L. T. 534; 40 W. R. 641 304
Simpson *v.* Sadd, 16 C. B. 26; 24 L. J. C. P. 156; 1 Jur. N. S. 736 .. 136
Skillbeck *v.* Hilton, L. R. 2 Eq. 587; 14 W. R. 1017 561
Skinners' Co. *v.* Knight, 65 L. T. 240; 40 W. R. 57 365
Slack *v.* Crewe, 2 F. & F. 59 329
Slater's Trusts, Re, 11 C. D. 227 270
Small *v.* National Provincial Bank of England, 13 L. N. 75; W. N. (1893) 13 296
Smethurst *v.* Hastings, 30 Ch. D. 490; 55 L. J. Ch. 173; 52 L. T. 567; 33 W. R. 496 229
Smith's Settled Estate, Re, (1891) 3 Ch. 65 462
Smith, In the goods of, 15 P. D. 2 537
Smith *v.* Cheese, 1 C. P. D. 60; 45 L. J. C. P. 156; 33 L. T. 670; 24 W. R. 368 313
Smith *v.* Clegg, 29 L. J. Ex. 300 336
Smith *v.* Gronow, 65 L. T. 117; 40 W. R. 46 209
Smith *v.* Gue, 61 L. J. Ch. 510; 67 L. T. 823; W. N. (1892) 132 489
Smith *v.* Humble, 15 C. B. 321 352
Smith *v.* Hunt, 54 L. T. 422 382
Smith *v.* Marrable, 11 M. & W. 5; 12 L. J. Ex. 223 341
Smith *v.* Meredith, 31 L. J. Ch. 317 221
Smith *v.* Robinson, 13 Ch. D. 148; 49 L. J. Ch. 20; 41 L. T. 405; 28 W. R. 37 ..... 46, 104
Smith *v.* Sibthorpe, 34 Ch. D. 732; 56 L. J. Ch. 771; 56 L. T. 878; 35 W. R. 663 244
Smith *v.* Surman, 9 B. & C. 829 61
Smith *v.* Wall, 18 L. T. 182 318
Smith *v.* Webster, 3 C. D. 49 40
Smith, Piseno & Co., Re, 44 C. D. 303; 59 L. J. Ch. 590; 38 W. R. 685 592
Smith and Stott, Re, 29 Ch. D. 1009, n. 224
Soloman, Re, W. N. (1889) 33 256
Soper *v.* Arnold, 37 Ch. D. 96; 57 L. J. Ch. 145; 57 L. T. 747; 35 W. R. 451 ..... 39, 51, 71
Southby *v.* Hutt, 2 M. & C. 207 135
Southcombe *v.* The Bishop of Exeter, 6 Hare, 213 74
Sowersby *v.* Lacey, 4 Mad. 142 414
Spanish Telegraph Co. *v.* Shepherd, 13 Q. B. D. 202 351
Sparks *v.* Montriou, 1 Y. & C. 133 137
Spears *v.* Hartley, 2 Esp. 817 74
Speight *v.* Gaunt, 9 App. Cas. 1; 53 L. J. Ch. 419; 32 W. R. 435 413
Spencer's Case, 1 S. L. Ca. 68 ..... 178, 208, 344
Spencer *v.* Bailey, 69 L. T. 179 184
Spencer *v.* Clark, 9 Ch. D. 137; 47 L. J. Ch. 692; 27 W. R. 133.. 133, 214
Spencer *v.* Spencer, 2 Sim. 87 505
Spencer Bell *v.* L. & S. W. Rail. Co., 4 Law Notes, p. 211 45
Spradbury's Mortgage, Re, 14 Ch. D. 514 280
Stafford *v.* Stafford, Re Price, 28 Ch. D. 709; 54 L. J. Ch. 509; 52 L. T. 430; 33 W. R. 520 498
Stafford *v.* Sutherland, 11 L. N. 140 429

PAGE

Stainforth *v.* Capon, 80 L. T. Journal, 376 311
Stalkschmidt *v.* Lett, 1 S. & G. 415 500
Stamford *v.* Roberts, 53 L. J. Ch. 338; 50 L. T. 147 .....586, 588, 590
Standard Manufacturing Co., Re, (1891) 1 Ch. 627; 64 L. T. 487; 39 W. R. 369 294
Stanford, Ex parte, Re Barber, 17 Q. B. D. 259.....306, 307
Stanley, Re, Irish L. Rep. 17 Ch. D. 487 318
Stanley *v.* Grundy, 22 Ch. D. 478 264
Stanley *v.* Hayes, 3 Q. B. 105; 11 L. J. Q. B. 176 .....342, 361
Stapilton *v.* Cheales, Tudor's Con. Cases 511, 512
Starr-Bowkett Building Society, Re, 42 C. D. 375; 58 L. J. Ch. 651; 61 L. T. 346; 38 W. R. 1 43
Stead *v.* Salt, 3 Bing. 103 548
Steele, Re, 1 P. & D. 578; 38 L. J. Prob. 68; 17 W. R. 15 482
Steele *v.* Mart, 4 B. & C. 272 337
Steele *v.* Walker, 28 Beav. 446 478
Stephens *v.* Guppy, 3 Russ. 171..... 45
Stephenson and Cox's Contracts 346
Stevens *v.* Marston, 64 L. T. 274; 39 W. R. 129 .....292, 294, 351, 355
Stevens *v.* Trevor-Garrick, (1893) 2 Ch. 307; 62 L. J. Ch. 660; 69 L. T. 11; 41 W. R. 412 .....391, 399
Stewart, Re, 41 C. D. 494; 60 L. T. 737; 37 W. R. 484 591
Stewart *v.* Alison, 1 Mer. 26 135
Stewart *v.* Gladstone, 10 Ch. D. 626; 40 L. T. 145; 27 W. R. 512 541
Stewart *v.* Sanderson, L. R. 10 Eq. 26; 39 L. J. Ch. 337; 22 L. T. 10; 18 W. R. 278 230
Stickney *v.* Sewell, 1 M. & C. 8 229
Stillman *v.* Weedon, 16 Sim. 26.....92, 528
Stocker *v.* Planet Building Society, 27 W. R. 877 353
Stocks *v.* Barrei, Johns. 54 493
Stockton Iron Furnace Co., Re, Ex parte Punnett, 10 Ch. D. 335; 48 L. J. Ch. 417; 40 L. T. 29; 27 W. R. 433 .....264, 265
Stoddart *v.* Savile, W. N. (1894) 186..... 407
Stogden *v.* Lee, (1891) 1 Q. B. 661; 60 L. J. Q. B. 669; 64 L. T. 494; 39 W. R. 467 386
Stokes *v.* Cheek, 28 Beav. 320..... 515
Stokes *v.* Salomons, 9 Ha. 75 492
Stone's Estate, Re, W. N. (1893) 50..... 212
Stone *v.* Greening, 13 Sim. 390 527
Stonnor's Trusts, Re, 27 Ch. D. 195; 52 L. J. Ch. 776; 48 L. T. 963; 32 W. R. 413 .....390, 395
Stoors *v.* Benbow, 2 M. & K. 46 487
Strong *v.* Stringer, 61 L. T. 470 .....73, 368
Stuart, Re, (1893) 2 Q. B. 201; 62 L. J. Q. B. 623; 69 L. T. 334; 41 W. R. 614 592
Stuckley *v.* Commissioners of Inland Revenue, 5 Ex. 85 479
Style *v.* Hearing, Cro. Jac. 73 339
Styles *v.* Wardle, 4 B. & C. 279..... 337
Sudeley and Baines' Contract, Re, 13 L. N. 41 .....71, 185
Sullivan *v.* Bishop, 2 C. & P. 359 384

PAGE
Sully *v.* Davis, L. R. 10 Eq. 562 527
Surplice *v.* Farnsworth, 7 M. & G. 576 353
Sutherland *v.* Sutherland, (1893) 3 Ch. 169; 62 L. J. Ch. 946; 69 L. T. 186; 42 W. R. 12 445
Sutton *v.* Sutton, 22 Ch. D. 511; 48 L. T. 95; 52 L. J. Ch. 333; 31 W. R. 369 ..... 218, 241
Sutton *v.* Wilders, L. R. 12 Eq. 373; 41 L. J. Ch. 30; 25 L. T. 292; 19 W. R. 1021 413
Swain *v.* Ayers and Luck, 20 Q. B. D. 585 ..... 72, 73, 335, 368
Swaine *v.* Holman, Hobb. 204 327
Sweet *v.* Meredith, 3 Giff. 610; 32 L. J. Ch. 147; 9 Jur. 569 136
Swift *v.* Pannell, 24 Ch. D. 210; 48 L. T. 351 ..... 295, 297, 301, 317, 319
Syer *v.* Gladstone, 30 Ch. D. 614 559

T.

Taltarum's Case, Tudor's Con. Cases, 695 93
Tamplin, Re, Ex parte Barnett, 59 L. J. Q. B. 194; 62 L. T. 264; 38 W. R. 351 302
Tamplin *v.* James, 15 Ch. D. 215; 43 L. T. 50; 29 W. R. 311 72
Tamplin *v.* Miller, 30 W. R. 422 7
Tancred *v.* Delagoa Bay Rail. Co., 23 Q. B. D. 239; 58 L. J. Q. B. 459; 61 L. T. 229; 38 W. R. 15 ..... 211, 240, 278
Tanner *v.* Christian, 12 M. & W. 316 329
Tanner *v.* Smith, 10 Sim. 410 43
Tanqueray-Willaume and Landau, Re, 26 Ch. D. 465; 51 L. J. Ch. 434; 46 L. T. 592 ..... 17, 233
Tarleton *v.* Bruton, Re Roberts, 30 Ch. D. 234 522
Tarn *v.* Turner, W. N. (1888) 51 ..... 248, 261
Tarrant's Trusts, Re, 58 L. J. Ch. 780 92
Taunton *v.* Sanomer, 3 H. & N. 280 312
Taylor, Re, 4 Ch. D. 157; 45 L. J. Ch. 399; 36 L. T. 696; 25 W. R. 69. 443
Taylor *v.* Allen, L. R. 16 Ch. 355 174
Taylor *v.* Cœnen, 1 Ch. D. 636; 34 L. T. 18 475
Taylor *v.* Eckersley, 5 Ch. D. 740; 36 L. T. 442; 25 W. R. 527 317
Taylor *v.* Lambert, 2 Ch. D. 177; 45 L. J. Ch. 418 511
Taylor *v.* Meads, 4 De G. J. & S. 597 7
Taylor *v.* Poncia, 25 Ch. D. 646; 53 L. J. Ch. 469; 50 L. T. 20; 32 W. R. 335 ..... 18, 160, 467
Taylor *v.* Shum, 1 B. & P. 21 342
Teasdale *v.* Braithwaite, 5 Ch. D. 630 472
Teavan, Re 396
Teevan *v.* Smith, 20 Ch. D. 724; 51 L. J. Ch. 621; 30 W. R. 716 246
Tempest *v.* Sylvester (Phillips *v.* Sylvester), L. R. 8 Ch. 173 66
Tench (Teuch) *v.* Southern Counties Deposit Co., 42 C. D. 741 301
Thackeray's Contracts, Re 23
Thatcher's Trusts, Re, 26 Ch. D. 426; 53 L. J. Ch. 1050; 32 W. R. 679. 405
Thirnton *v.* Bright, 6 L. J. Ch. 121 573

PAGE

Thomas and Turner, Re, 33 C. D. 292 ; 55 L. T. 534 ; 35 W. R. 177 .. 156
Thomas *v.* Blackman, 1 Co. 30 64
Thomas *v.* Kelly, 13 Ap. Ca. 506 ; 58 L. J. Q. B. 66 ; 37 W. R. 353 .. 297, 302, 308
Thomas *v.* McKenzie, 68 L. T. 816 ; W. N. (1893) 90 .....499, 528
Thomas *v.* Searles, (1891) 2 Q. B. 408 ; 65 L. T. 39 ; 39 W. R. 692..297, 302
Thompson, Ex parte, Re Wood, W. N. (1884) 28 7
Thompson *v.* Lapworth, 3 C. & P. 349..... 352
Thompson *v.* Simpson, 1 D. & W. 459..... 570
Thompson *v.* Teuton, 9 Ha. Ap. 49 138
Thorne *v.* Heard, (1893) 3 Ch. 350 ; 62 L. J. Ch. 1010 ; 68 L. T. 791 ; 41 W. R. 636 20
Thorne *v.* Thorne, (1893) 3 Ch. 196 ; 63 L. J. Ch. 38 ; 69 L. T. 378 .. 210
Thornett *v.* Haines, 15 M. & W. 372 39
Thornton *v.* Sherratt, 8 Taunt. 529 358
Thorpe *v.* Bestwick, 6 Q. B. D. 311..... 113
Three Towns Building Co. *v.* Maddever, 27 Ch. D. 523 ; 53 L. J. Ch. 998 ; 52 L. T. 35 ; 33 W. R. 286.....55, 115, 476
Throssell *v.* Marsh, 53 L. T. 321 313
Thursby *v.* Plant, 1 Wms. Saund. 240 ..... 208, 342
Thwaites *v.* Wilding, 12 Q. B. D. 4 ; 53 L. J. Q. B. 1 ; 49 L. T. 396 ; 32 W. R. 80 349
Thynne *v.* Shove, 45 C. D. 577 ; 59 L. J. Ch. 509 ; 62 L. T. 803 ; 38 W. R. 667 216
Tilley *v.* Thomas, L. R. 3 Ch. Ap. 61 ; 17 L. T. 422 ; 16 W. R. 166 .. 45
Timmins *v.* Rawlinson, 3 Burr. 1605 383
Timson *v.* Ramsbotham, 2 Keen, 35 212
Tippett and Newbould, Re, L. R. 37 Ch. 444..... 156
Tippett *v.* Strutt, W. N. (1891) 112 271
Tipton Green Colliery Co. *v.* Tipton Moat Colliery Co., 7 Ch. D. 192 ; 47 L. J. Ch. 152 ; 26 W. R. 348 288
Tiseman *v.* Westland, 1 Y. & J. 117..... 141
Todd, Ex parte, Re Ashcroft, 19 Q. B. D. 186 ; 57 L. T. 835 ; 35 W. R. 676 476
Toker *v.* Toker, 3 De G. J. & S. 487..... 477
Toler *v.* Slater, 37 L. J. Q. B. 33 326
Tollet *v.* Tollet, 2 P. Wms. 489..... 91
Tomlin *v.* Luce, 43 C. D. 191 ; 62 L. T. 18 ; 38 W. R. 323 20
Tomlinson *v.* Consolidated Loan Co., 24 Q. B. D. 135 ; 38 W. R. 118 .. 303
Tomson *v.* Judge, 3 Drew. 306 19
Topham *v.* Greenside Glazed Firebrick Co., 37 C. D. 281 ; 36 W. R. 465.. 296
Topley *v.* Crosbie, 20 Q. B. D. 350 306
Towns *v.* Wentworth, 11 Moo. P. C. 543..... 483
Townsend, Re, Parsons, Ex parte, 16 Q. B. D. 532 ; 55 L. J. Q. B. 137 ; 53 L. T. 897 ; 34 W. R. 329 292
Townsend *v.* Martin, 7 Ha. 471..... 503
Tozer *v.* Buxton, 5 T. L. R. 7 256
Trappes *v.* Meredith, L. R. 9 Eq. 229 ; 10 Eq. 604 ; 7 Ch. Ap. 248 516
Travers *v.* Travers, 2 Beav. 179..... 395
Treloar *v.* Bigge, L. R. 9 Ex. 151 ; 43 L. J. Ex. 95 ; 22 W. R. 843.... 360

PAGE
Tremeere *v.* Morrison, 4 M. & Sc. 613 209
Trent *v.* Hunt, 9 Ex. 14; 22 L. J. Ex. 318 347
Troup *v.* The Commissioners of Inland Revenue, 7 T. L. R. 610 545
Tubbs *v.* The Mayor, &c. of London, 13 L. N. (1894) 76 44
Tuck *v.* Southern Counties Deposit Bank, 42 C. D. 471; 61 L. T. 348; 37 W. R. 769 302
Tucker *v.* Tucker, (1893) 2 Ch. 323; 62 L. J. 442; 65 L. T. 85; 41 W. R. 505 428
Tucker *v.* Vowles, (1893) 1 Ch. 195; 62 L. J. Ch. 172; 67 L. T. 763; 41 W. R. 156 185
Tulk *v.* Moxhay, 2 Ph. 774 ..... 177, 183, 208, 345
Tullett *v.* Armstrong, 1 L. C. Eq. 7
Turner and Skelton, Re, 13 Ch. D. 130; 49 L. J. Ch. 114; 41 L. T. 668; 28 W. R. 312 ..... 31, 50
Turner, Harriet, Re 158
Turner *v.* Collings, L. R. 7 Ch. Ap. 329 561
Turner *v.* Meymott, 1 Bing. 158 383
Turner *v.* Turner, 1 J. & W. 39 527
Turpin *v.* Chambers, 29 Beav. 104 43
Tyers *v.* Alsop, 61 L. T. 8; 37 W. R. 339 19
Tyler *v.* Yates, L. R. 6 Ch. Ap. 665; 40 L. J. Ch. 665; 25 L. T. 284; 19 W. R. 909 168
Tyndall *v.* Castle, W. N. (1893) 40 185

U.

Underhill *v.* Roden, 2 Ch. D. 494; 45 L. J. Ch. 266 510
Union Bank *v.* Ingram, 20 C. D. 463 242
United Telephone Co. *v.* Bassano, 31 Ch. D. 630; 55 L. J. Ch. 625; 54 L. T. 479; 34 W. R. 537 ..... 299, 301
Upperton *v.* Nickolson, L. R. 6 Ch. Ap. 436 42

V.

Valentini *v.* Caroli (Canali), 24 Q. B. D. 166; 59 L. J. Q. B. 74; 61 L. T. 734; 38 W. R. 331 5
Vance (Vince), Re, (1892) 1 Q. B. 587 547
Vancouver *v.* Bliss, 11 Ves. 464 136
Vansittart, Re, (1893) 1 Q. B. 181; 2 Q. B. 377; 62 L. J. Q. B. 277, 279; 67 L. T. 592; 68 L. T. 233 ..... 47, 55, 476
Varden's Trusts, Re, 31 Ch. D. 275 399
Varley *v.* Coppard, L. R. 7 C. P. 505 360
Vaux's Case, Cro. Eliz. 269 338
Venn and Furze's Contract, Re, W. N. (1894) 31 233
Vernon *v.* Cook, 49 L. J. C. P. 767 300
Vernon *v.* Hallam, 34 C. D. 748; 56 L. J. Ch. 115; 55 L. T. 676; 35 W. R. 156 ..... 215, 216, 541
Vickery *v.* Evans, 3 W. R. 286 ..... 230, 409

PAGE
Vine *v.* Raleigh, (1891) 2 Ch. 13; 63 L. T. 573 524
Viner *v.* Francis, 2 Cox, 190 486
Viney *v.* Chaplin, 2 De G. & J. 468; 27 L. J. Ch. 434 191
Vint *v.* Padgett, 1 Giff. 446; 28 L. J. Ch. 21 236

W.

Waddiham *v.* Postmaster-General, L. R. 6 Q. B. 644; 40 L. J. Q. B. 310 364
Waddilove *v.* Waddilove, Law Times Newspaper, 176 493
Waddington *v.* Bristowe, 2 B. & P. 452 61
Wade, Re, 1 H. & T. 202 21
Wadmore *v.* Toller, 6 T. L. R. 58 29
Wagstaffe *v.* Wagstaffe, L. R. 8 Eq. 229; 38 L. J. Ch. 528 498
Wain *v.* Warlters, 5 East, 10 40
Wainwright *v.* Elwell, 1 Madd. 632 204
Waite *v.* Littlewood, 41 L. J. Ch. 636 481
Wake (Ware), Re, (1892) 1 Ch. 344 3
Wake *v.* Varah, 2 C. D. 348; 45 L. J. Ch. 533; 34 L. T. 437; 24 W. R. 621 495
Walker's Trusts, Re, 48 L. T. N. S. 632; 31 W. R. 716 465
Walker and Wife *v.* Hobbs & Co., L. R. 23 Q. B. D. 458; 38 W. R. 63 341
Walker *v.* Main, 1 J. & W. 1 523
Walker *v.* Mottram, 19 C. D. 355; 51 L. J. Ch. 108; 45 L. T. 659; 30 W. R. 165 215
Walker *v.* Reeves, 3 Doug. 19 208
Walker *v.* Walker, 59 L. J. Ch. 386; 62 L. T. 449 ..... 229, 413
Walkley, In the Goods of, 69 L. T. 419; W. N. (1893) 62 483
Wallis *v.* Hands, (1893) 2 Ch. 75; 62 L. J. Ch. 586; 68 L. T. 428; 41 W. R. 471 ..... 88, 129, 372
Wallis *v.* Routh, 2 Law Notes, 4 19
Walls *v.* Atcheson, 3 Bing. 462 371
Walsh *v.* Bishop of Lincoln, L. R. 10 C. P. 518; 44 L. J. C. P. 244; 32 L. T. 471; 23 W. L. 839 220
Walsh *v.* Lonsdale, 21 C. D. 9; 52 L. J. Ch. 2; 46 L. T. 858; 31 W. R. 106 ..... 72, 335, 348
Walshe *v.* Brown, 62 L. T. 899 486
Walton, Ex parte, Levy, Re, L. R. 17 Ch. D. 746; 50 L. J. Ch. 657; 45 L. T. N. S. 1; 30 W. R. 395 269
Want *v.* Campain, 9 T. L. R. 254 ..... 231, 409
Want *v.* Stallibras, 8 Ex. 178 ..... 41, 42
Ward *v.* Duncombe, (1893) A. C. 369; 62 L. J. Ch. 881; 69 L. T. 121; 42 W. R. 59 212
Ward *v.* Holmes, L. R. 32 Ch. D. 209; 55 L. J. Ch. 420; 54 L. T. 266 .. 590
Ward *v.* Ponard, 9 T. L. R. 410 62
Ward *v.* Shallett, 2 Ves. sen. 16 473
Ward *v.* Ward, 2 H. L. Cas. 784 415
Warden, Re, 2 Curt. 334 538

PAGE
Ware *v.* Gardner, L. R. 7 Eq. 317; 38 L. J. Ch. 348; 20 L. T. 71; 17 W. R. 439 475
Waring *v.* Lee, 8 Beav. 247 570
Waring *v.* Scotland, 57 L. J. Ch. 1016; 59 L. T. 132; 36 W. R. 756 .. 29
Waring *v.* Ward, 7 Ves. 332 182
Warner *v.* Jacob, L. R. 20 Ch. D. 220 ..... 20, 255
Warren's Settlements, Re, 52 L. J. Ch. 928; 49 L. T. 696 7
Waters *v.* Weigall, 6 Times Law R. 488 353
Watkin *v.* Nash, L. R. 20 Eq. 262; 44 L. J. Ch. 505; 23 W. R. 647 .. 190
Watson, Re, Ex parte Official Receiver, L. R. 25 Q. B. D. 27; 59 L. J. Q. B. 394; 63 L. T. 209; 38 W. R. 567 293
Watson *v.* Home, 7 B. & C. 285 352
Watson *v.* Strickland, 19 Q. B. D. 391; 56 L. J. Q. B. 594; 35 W. R. 769 306
Watts *v.* Porter, 3 E. & B. 743 140
Waugh *v.* Wyche, 2 Drew. 326 192
Weardale Iron Co. *v.* Hudson, 13 L. N. 105 308
Webb *v.* Jonas, L. R. 39 Ch. D. 660 231
Webber *v.* Corbett, L. R. 16 Eq. 515 483
Webster *v.* Morris, 22 Ch. D. 316; 52 L. J. Ch. 375; 48 L. T. 295; 31 W. R. 111 315
Weddall, Re, Parker *v.* Parker, 29 Sol. Jour. 438 588
Weigall *v.* Walters, 6 Times Law R. 488 353
Welby *v.* Welby, 2 V. & B. 199 492
Weldon *v.* Neal, 15 Q. B. D. 471; 51 L. T. 289; 32 W. R. 828 73
Weldon (Wilder) *v.* Piggott, 22 Ch. D. 264 399
Wellesley *v.* Mornington, 2 K. & J. 143 574
Wellesley *v.* Withers, 4 E. & B. 750 559
Wells *v.* Wells, 2 S. & T. 607 489
Wenman *v.* Lyon, (1891) 2 Q. B. 192; 60 L. J. Q. B. 223; 65 L. T. 136; 39 W. R. 301 294
Wenmouth, Re, 57 L. T. 709 487
Werth *v.* L. & W. Loan & Discount Co., 5 T. L. R. 521 350
West *v.* Burney, 1 R. & M. 434 574
West *v.* Dobbs, L. R. 5 Q. B. 460; 39 L. J. Q. B. 190; 18 W. R. 1167 359
West *v.* Ray, 1 Kay, 385 92
West *v.* Wythes, (1893) 2 Ch. 369; 62 L. J. Ch. 665; 68 L. T. 520; 41 W. R. 375 138
West London Commercial Bank *v.* Permanent Benefit Building Society, L. R. 29 C. D. 954 ..... 20, 255
West of England Bank *v.* March, 23 Ch. D. 138 17
Western Waggon Property Co. *v.* West, (1892) 1 Ch. 271 278
Westlake *v.* Adams, 5 C. B. N. S. 248 168
Weston *v.* Managers, 9 Q. B. D. 404; 51 L. J. Q. B. 339; 46 L. T. 580; 30 W. R. 387 356
Weston *v.* Savage, 10 Ch. D. 736 57
Wheeler *v.* Thomas, 7 Jur. 599 498
Wheelwright *v.* Walker, 52 L. J. Ch. 274 ..... 448, 465
White and Terry's Contracts, Re, 32 Ch. D. 14 50
White's Trusts, Re, 1 John. 656 280

PAGE
White *v.* Bass, 31 L. J. Ex. 283 174
White *v.* Boby, 26 W. R. 133 72
White *v.* Chitty, L. R. 1 Eq. 372; 35 L. J. Ch. 343; 13 L. T. 750; 14 W. R. 366 401
White *v.* City of London Brewery Co., L. R. 42 Ch. D. 237; 53 L. J. Ch. 855; 61 L. T. 741; 38 W. R. 82 288
Whiteacre *v.* Symmons, 10 East, 13 373
Whitefield *v.* Langdale, 1 Ch. D. 61; 45 L. J. Ch. 177; 33 L. T. 592; 24 W. R. 313 491
Whitefield *v.* Prickett, 2 Keen, 608 402
Whitehead *v.* Stare, L. T. 467 486
Whiteley *v.* Learoyd, 33 C. D. 347; 55 L. J. Ch. 864; 55 L. T. 564; 34 W. R. 450 ..... 229, 230
Whitelock *v.* Baker, 13 Ves. 514 116
Whitlock's Case, 8 Rep. 69 339
Whittemore *v.* Whittemore, L. R. 8 Eq. 603 50
Whittingham *v.* Murdy, 60 L. T. 956 5
Whitworth *v.* Gaugain, 3 Ha. 416 144
Whitworth (Ashworth) *v.* Lord, L. R. 36 Ch. 545 289
Wickenden *v.* Webster, 5 E. & B. 387; 25 L. J. Q. B. 264; 2 Jur. 590.. 358
Wickham *v.* Walker (Hawkes), 7 M. & W. 63 174
Widdo, Re, L. R. 11 Eq. 408 109
Wigham *v.* Measor, 5 W. R. 394 250
Wilkes *v.* Greenaway, 6 T. L. R. 449 ..... 123, 222
Wilkes *v.* Steward, Coop. C. C. 6 230
Wilkins *v.* Hogg, 8 Jur. 25; 3 Giff. 116 416
Wilkinson, Re, L. R. 13 Eq. 534; 41 L. J. Ch. 392 255
Wilkinson *v.* Gerard Frères, 7 T. 266 293
Wilkinson *v.* Joughin, 41 L. J. Ch. 234 485
Wilkinson *v.* Parry, 4 Russ. 274 420
Wilkinson *v.* Rodgers, 22 W. R. 119 358
Willett and Argenti, Re, 60 L. T. 735 ..... 33, 139
Williams, Ex parte, L. R. 7 Ch. D. 138; 47 L. J. Bank. 46; 37 L. T. N. S. 764; 26 W. R. 274 ..... 237, 265
Williams, Re, 49 L. T. 475; 32 W. R. 187 305
Williams *v.* Aylesbury Rail. Co., 21 W. R. 819 75
Williams *v.* Burrell, 1 C. B. 429 341
Williams *v.* Earle, L. R. 3 Q. B. 379; 37 L. J. Q. B. 231; 16 W. R. 1041 344
Williams *v.* Evan, 44 L. J. Ch. 319 336
Williams *v.* Glenton, L. R. 1 Ch. 200; 35 L. J. Ch. 284; 13 L. T. 727; 12 Jur. 175; 14 W. R. 294 44
Williams *v.* Kershaw, 1 Keen, 275 518
Williams *v.* Spargo, W. N. (1893) 100 ..... 52, 106
Willis, Re, Ex parte Kennedy, L. R. 21 Q. B. D. 384; 57 L. J. Q. B. 634; 59 L. T. 749; 35 W. R. 793 ..... 264, 292, 294
Willmott, Re, 1 Sw. & Tr. 36; 27 L. J. Prob. 30; 6 W. R. 409 523
Wills *v.* Stradling, 3 Ves. jun. 378 65
Wilson, Re, 29 Ch. D. 790 ..... 582, 589

PAGE
Wilson *v.* Eden, 5 Ex. 752 527
Wilson *v.* Finch-Hatton, L. R. 2 Ex. D. 336; 46 L. J. Ex. 489; 36 L. T. 473; 25 W. R. 537 341
Wilson *v.* Hart, L. R. 1 Ch. 463; 35 L. J. Ch. 369; 12 L. T. 798; 13 W. R. 983 ..... 133, 183, 345
Wilson *v.* Holloway, (1893) 2 Ch. 340; 62 L. J. Ch. 781; 68 L. T. 785; 41 W. R. 684 551
Wilson *v.* O'Leary, L. R. 17 Eq. 419 508
Wilson *v.* Turner, 22 Ch. D. 521; 52 L. J. Ch. 270; 48 L. T. 370 406
Wilson *v.* Williams, 3 Jur. N. S. 810 159
Wilson *v.* Wilson, 5 H. L. Ca. 40 524
Windus *v.* Windus, 21 Beav. 373 492
Winscomb *v.* Dunch, Godb. 270 114
Winter, Ex parte, 44 L. T. N. S. 323; 29 W. R. 575 311
Winterbottom *v.* Ingham, 7 Q. B. 611; 14 L. J. Q. B. 298 67
Wisstler (Whistler), Re, 35 Ch. D. 561 233
Witherington *v.* Bankes, Sel. Ca. in Ch. 30 260
Witt *v.* Banner, 20 Q. B. D. 114; 56 L. J. Q. B. 550; 57 L. T. 307; 36 W. R. 115 307
Wollaston *v.* King, L. R. 8 Eq. 165 571
Wollaston *v.* Tribe, L. R. 9 Eq. 44 471
Wood, Re, Ex parte McHattie, L. R. 10 Ch. D. 398; 48 L. J. Bk. 26; 39 L. T. 373; 27 W. R. 327 592
Wood, Re, Ex parte Wolfe, W. N. (1894), 35 ..... 303, 308
Wood *v.* Beard, 2 Ex. D. 30; 46 L. J. M. C. 100; 35 L. T. 866 372
Wood *v.* Wood, 9 Ex. 190 552
Woodhouse *v.* Walker, 5 Q. B. D. 404; 49 L. J. Q. B. 609; 42 L. T. 770; 28 W. R. 765 429
Woodmeston *v.* Walker, 2 Russ. & M. 606 515
Woodward *v.* Heseltine, (1891) 1 Ch. 464; 64 L. T. 303; 60 L. J. Ch. 357; 39 W. R. 405 ..... 306, 308
Worcester School Trustees *v.* Rowlands, 9 C. & P. 734 354
Worley *v.* Frampton, 5 Ha. 560 179
Worrall *v.* Jacob, 3 Mer. 256 568
Worsley *v.* Earl of Scarborough, 3 Atk. 391 150
Worthington (Warrington) *v.* Crumpton, 5 C. B. 635 384
Wright's Trustee, 28 C. D. 93; 54 L. J. Ch. 60; 51 L. T. 781; 33 W. R. 304 17
Wright *v.* Callender, 2 D. M. & G. 652 515
Wright *v.* Smith, 5 Esp. 203 383
Wyatt *v.* Berry, (1893) P. 5; 62 L. J. P. 28; 68 L. T. 416 537
Wyndham *v.* Way, 4 Taunt. 316 374
Wynn *v.* Williams, 3 Ves. jun. 130 151

Y.

PAGE
Yeap Chean Neo. *v.* Ong Cheng Neo, L. R. 6 P. C. 396 490
Yellowby *v.* Gower, 24 L. J. Ex. 289 ..... 330, 341
Yielding and Westbrooke, Re, L. R. 31 Ch. D. 344; 55 L. J. Ch. 496; 54 L. T. 531 156
York Banking Co. *v.* Artley, 11 C. D. 205; 27 W. R. 704 274
Young and Harston, Re, 29 C. D. 691 45
Young *v.* Smith, 31 Beav. 87 164

TABLE OF STATUTES.

PAGE

13 Edw. 1, c. 1 (De Donis) 88
18 Edw. 1, c. 1 (Quia Emptores) 175
27 Hen. 8,
c. 10 (Uses, 1535) 89, 100
c. 16 (Bargains and Sales Enrolment, 1535) 90
32 Hen. 8, c. 34 (Reversions, 1540).. 368
13 Eliz. c. 5 (Creditors, 1571)....55, 115, 167, 390, 473, 475
27 Eliz. c. 4 (Purchasers, 1585)..115, 167, 473, 474
13 Eliz. c. 4 (Crown Debts) 148
13 Eliz. c. 6 (Advowsons) 220
21 Jac. 1, c. 16 (Limitation, 1624), s. 3 73
12 Car. 2, c. 24 (Military Tenures, 1660) 122, 532, 533
29 Car. 2, c. 3 (Statute of Frauds, 1677)..40, 61, 86, 89, 144, 175, 334, 404
4 & 5 W. & M. c. 16 (Mortgages, 1693) 248
4 & 5 Anne,
c. 3 (Attornment, 1706) 73
c. 16 (Limitations, 1706) 73
7 Anne, c. 20 (Registry, 1708) 141
8 Anne, c. 14 (Landlord and Tenant, 1709) 348, 350
13 Anne, c. 2 (Simony, 1714) 220
4 Geo. 2, c. 28 (Landlord and Tenant, 1731), s. 5 .....216, 364, 368, 383
11 Geo. 2, c. 19 (Landlord and Tenant, 1738) 350, 383
14 Geo. 2, c. 20 (Evidence, 1741)..94, 113
20 Geo. 2, c. 42 (Wales, 1747) 449
14 Geo. 3, c. 78 (Insurance, 1774) .. 253, 341, 355, 356
36 Geo. 3, c. 52 (Legacy Duty, 1796) 126
38 Geo. 3, c. 5 (Land Tax, 1799).... 340

PAGE

39 & 40 Geo. 3, c. 98 (Thellusson Act, 1800) 436, 524
43 Geo. 3, c. 108 (Queen Anne's Bounty, 1803) 12
55 Geo. 3, c. 192 (Copyholds, 1815).. 205
42 Geo. 3, c. 116 (Land Tax, 1801).. 117
9 Geo. 4,
c. 14 (Tenterden's Act, 1828), s. 1 74
c. 94 (Resignation Bonds, 1828) 221
11 Geo. 4, c. 65 .....325, 327
11 Geo. 4 & 1 Will. 4,
c. 40 (Executors, 1830) 92, 534
c. 46 (Illusory Appointments, 1830) 92, 572
c. 65 (Infants, 1830) 98, 325
1 Will. 4, c. 46..... 92
2 & 3 Will. 4, c. 71 (Prescription, 1832) 96, 123
3 & 4 Will. 4,
c. 27 (Limitation, 1833)..32, 95, 126, 241, 348, 563
c. 42 (Limitation, 1833) 181, 348, 350, 383
c. 74 (Fines, 1833),
s. 18 562
s. 23 563
s. 24 563
s. 27 563
s. 32 563
s. 39 562
s. 40 152
s. 41 152
s. 42 564
s. 43 564
s. 44 564
s. 46 564
s. 50 ..... 195, 205
s. 88 122
s. 91 6
c. 105 (Dower, 1833) 99
c. 106 (Descent, 1833)..... 98

PAGE

6 & 7 Will. 4, c. 71 (Tithes, 1836) .. 123

7 Will. 4 & 1 Vict. c. 26 (Wills, 1837),
s. 3 .....91, 94, 205
s. 6 94
s. 9 536
s. 10 .....91, 92
s. 15 .....113, 534, 537
s. 24 498
s. 25 499
s. 26 527
s. 27 ..... 527, 572
s. 28 528
s. 29 529
s. 30 529
s. 32 531
s. 33 ..... 520, 531

1 & 2 Vict.
c. 20 (Queen Anne's Bounty, 1838) 176
c. 74 (Landlord and Tenant, 1838), 370, 383
c. 110 (Uniformity of Process, 1838) 144, 148

2 & 3 Vict. c. 11 (Judgments, 1839)..145, 148, 150

3 & 4 Vict.
c. 82 (Judgments, 1840) 145, 148
c. 92 (Evidence, 1840)..... 116
c. 113 (Simony, 1840)..... 220

4 & 5 Vict.
c. 21 (Release, 1841) 91, 112
c. 35 (Copyholds, 1841) 204

5 & 6 Vict. c. 35 (Property Tax, 1842) 340, 347

7 & 8 Vict. c. 76 (Real Property, 1844) 163

8 Vict. c. 20 (Railway Clauses, 1845) 172

8 & 9 Vict.
c. 18 (Lands Clauses, 1845)..3, 4, 10, 21, 176, 181
c. 43 (Evidence, 1845) 124
c. 56 (Limited Owners, 1845) .. 129
c. 106 (Real Property, 1845)..10, 72, 85, 86, 88, 89, 95, 169, 176, 195, 208, 334, 370, 559
c. 112 (Satisfied Terms, 1845) .. 127, 284, 425
c. 113 (Evidence, 1845) 112
c. 118 (Inclosure, 1845),
s. 13 87
s. 147 .....51, 52, 85
s. 150 85
c. 119 (Concise Conveyances, 1845).....93, 576
c. 124 (Leases, 1845) 93, 577

9 & 10 Vict. c. 70 (Copyholds, 1846).. 85

10 & 11 Vict. c. 111 (Copyholds, 1847) 85

12 & 13 Vict. PAGE
c. 26 (Leases, 1849)..... 330
c. 109 (Evidence, 1849) 113

13 & 14 Vict. c. 17 (Leases, 1850) .. 330

14 & 15 Vict. c. 25 (Emblements, 1851) 375

15 & 16 Vict.
c. 24 (Wills Amendment, 1852).. 536
c. 51 (Enfranchisement, 1852).. 34, 172
c. 76 (Common Law Procedure, 1852) 364
c. 86 (Lunatics, 1852)..249, 250, 251
c. 51 (Copyhold, 1852) 34

16 & 17 Vict.
c. 51 (Succession Duty, 1853) .. 117 *et seq.*
c. 70 (Copyholds, 1853) 98

17 & 18 Vict. c. 113 (Locke King's Act, 1854).....70, 505

18 & 19 Vict.
c. 15 (Annuities, 1855) 125, 145, 150, 218
c. 43 (Infants' Settlements, 1855) 4, 397
c. 124 (Mortmain, 1855)..... 12

19 & 20 Vict. c. 97 (Mercantile Amendment, 1856) 73, 74

20 & 21 Vict.
c. 57 (Reversionary Choses, 1857) 195, 210
c. 77 (Wills, 1857) 113

21 & 22 Vict.
c. 27 (Damages, 1858) 72
c. 94 (Copyholds, 1858) 206

22 & 23 Vict. c. 35 (Lord St. Leonards' Act, 1859),
s. 1 369
s. 2 369
s. 3 ..... 343, 344, 369
s. 12 92
s. 14 .....16, 17, 231
s. 15 .....16, 17, 231
s. 16 ..... 16, 17, 231, 501
s. 17 .....16, 17, 231
s. 18 231
s. 19 98
s. 20 98
s. 23 193
s. 24 80
s. 27 210
s. 48 148

23 & 24 Vict.
c. 38 (Lord St. Leonards' Amendment Act, 1860),
s. 1 145
s. 6 369
c. 115 (Registration, 1860)..126, 147, 149, 150, 151

23 & 24 Vict. PAGE
c. 145 (Lord Cranworth's Act, 1860),
s. 9 232
s. 29 ..... 193, 254

24 & 25 Vict.
c. 21 (Agents, 1861) 329
c. 114 (Kingsdown's Act, 1861).. 535

25 & 26 Vict.
c. 53 (Land Registry, 1862)..93, 586
c. 67 (Conveyances, 1862) 586

27 & 28 Vict.
c. 112 (Judgments, 1864) .. 145, 235
c. 114 (Improvement of Land, 1864) 130

28 & 29 Vict.
c. 104 (Crown Debts, 1865) 149
c. 112 (Simony, 1865)..... 220

30 & 31 Vict.
c. 48 (Sales by Auction, 1867)..38, 58
c. 69 (Mortgages, 1867) 70, 505
c. 144 (Life Policies, 1867).. 214, 271

31 Vict. c. 4 (Reversions, 1868) 168

31 & 32 Vict.
c. 40 (Partition, 1868) 86
c. 101 (1868)..... 535
c. 122, s. 39 (1868) 390

32 & 33 Vict.
c. 41 (Poor Rates, 1868) 340, 352
c. 46 (Hinde Palmer's Act, 1869) 240

33 & 34 Vict.
c. 23 (Felony Act, 1870)..97, 99, 100
c. 34 (Mortmain, 1870) 11, 12, 16
c. 35 (Apportionment, 1870).... 427
c. 14 (Naturalization, 1870) 10

34 & 35 Vict.
c. 79 (Lodgers, 1871) 349
c. 84 (Limited Owners, 1871) .. 130

35 & 36 Vict. c. 24 (Mortmain, 1872). 12

36 & 37 Vict.
c. 50 (Places of Worship, 1873).. 12
c. 66 (Judicature Act, 1873)..58, 210, 213, 214, 240, 246, 278, 287, 424, 428

37 & 38 Vict.
c. 37 (Powers Amendment, 1874) 92, 573
c. 42 (Building Society, 1874) .. 284, 290
c. 57 (Real Property Limitation, 1874),
s. 7 249
s. 8 ..... 146, 218, 241
s. 10 ..... 126, 127, 501
s. 14 95
c. 62 (Infants, 1874) 5, 324

37 & 38 Vict. PAGE
c. 78 (Vendor and Purchaser, 1874),
s. 2 ..35, 52, 104, 105, 106, 137, 165, 188, 239, 262, 324
s. 4 ..... 128, 258
s. 7 235
s. 8 142
s. 9 ..... 57, 155, 346
s. 10 500

38 & 39 Vict.
c. 60 (Friendly Societies, 1875).. 284
c. 83 (Local Loans, 1875) 411
c. 55 (Public Health, 1875) 352
c. 87 (Land Transfer, 1875),
s. 48 ..... 69, 128
s. 127 ..... 141, 586

39 & 40 Vict. c. 17 (Partition, 1876).. 86

40 & 41 Vict.
c. 18 (Settled Estates, 1877),
s. 2 467
s. 4 325
s. 8 468
s. 9 468
s. 12 468
s. 13 468
s. 16 ..... 4, 468
s. 22 468
s. 23 468
s. 24 ..... 331, 468
s. 25 331
s. 26 ..... 331, 468
s. 27 ..... 331, 468, 469
s. 28 ..... 331, 468
s. 29 ..... 331, 468
s. 32 469
s. 33 469
s. 34 469
s. 38 469
s. 46 .....325, 332, 467, 469
s. 47 332
s. 48 332
s. 49 ..... 325, 470
s. 50 470
s. 55 440
s. 56 332
s. 57 469
c. 33 (Contingent Remainders, 1877) 434
c. 34 (Mortgages, 1877) 70

41 & 42 Vict.
c. 31 (Bills of Sale, 1878),
s. 4 295
s. 6 265
s. 8 ..... 295, 300, 317
s. 10 300
s. 20 ..... 295, 318

42 & 43 Vict. c. 59 (Outlawry, 1879). 11

43 & 44 Vict. c. 47 (Ground Game, 1880) 381

44 & 45 Vict. PAGE
c. 41 (Conveyancing, 1881),
s. 3 .. 32, 35, 46, 47, 51, 53, 80, 104, 105, 106, 122, 128, 138, 165, 208, 416
s. 4 ..... 70, 106, 325
s. 5 ..... 56, 198
s. 6 173
s. 7 .... 8, 173, 179, 180, 181, 208, 267, 271, 278, 399
s. 8 191
s. 9 .... 35, 185, 186, 187, 188
s. 10 .....176, 342, 343
s. 11 343
s. 12 ..... 176, 343
s. 13 .....105, 106, 261, 324
s. 14 .. 268, 335, 355, 365, 366, 367
s. 15 246
s. 16 137
s. 17 ..... 233, 237
s. 18 .....261, 288, 381
s. 19 .. 159, 252, 254, 258, 260, 272, 274
s. 20 .....159, 237, 254
s. 21 .. 254, 256, 257, 274, 275
s. 22 .....254, 256, 274
s. 23 ..... 253, 274
s. 24 ..... 254, 258, 274
s. 25 .....249, 250, 254, 274
s. 26 271
s. 27 282
s. 28 280
s. 29 280
s. 30..23, 69, 128, 245, 281, 475, 560
s. 35 16
s. 36.....194, 414
s. 38 408
s. 39 7
s. 41 .....4, 325
s. 42 436
s. 43 .....403, 405, 506
s. 44 .....217, 427, 431
s. 46 .....111, 325, 329
s. 47 111
s. 48 112
s. 49 .....91, 170, 325
s. 51 434
s. 52 .....515, 574
s. 54.....168, 249
s. 55 .....107, 121, 168
s. 56 .....168, 191, 192
s. 58.....176, 245
s. 59 ....170, 176, 177, 180, 245
s. 60 .....176, 178, 245
s. 61 244
s. 63.....173, 222
s. 64.....176, 178
s. 65 222

44 & 45 Vict. PAGE
c. 41 (Conveyancing, 1881),
s. 67 256
c. 44 (Solicitors' Remuneration, 1881) 576

45 Vict. c. 9 (Evidence, 1882) 112

45 & 46 Vict.
c. 21 (Corporations, 1882) 12
c. 38 (Settled Land, 1882),
s. 2 .....439, 443
s. 3 .....85, 438, 446, 460
s. 4 438
s. 6 .....440, 559
s. 7 .....452, 453
s. 8 453
s. 11.....223, 460
s. 13 455
s. 14.....438, 455
s. 16 455
s. 18.....232, 460
s. 19 440
s. 21.....412, 460
s. 25.....454, 457
s. 27 458
s. 28 458
s. 29 458
s. 30 459
s. 31 460
s. 33.....412, 460
s. 34 463
s. 35 .....429, 460, 464
s. 37 448
s. 38.....448, 464
s. 39.....464, 465
s. 40.....194, 464
s. 41.....464, 465
s. 42.....464, 465
s. 43.....464, 465
s. 45 447
s. 50.....267, 444
s. 51 445
s. 52 445
s. 53 445
s. 54 .....54, 445
s. 55 .....55, 445
s. 56 .....17, 446
s. 57 446
s. 58 440
s. 59 .....4, 158, 325, 441
s. 60 .....158, 232, 325, 442
s. 61 442
s. 62 442
s. 63 .....394, 466, 467
c. 39 (Conveyancing, 1882),
s. 2 153
s. 3 .....133, 134
s. 4 .....106, 269
s. 6 572
s. 7 ..... 8, 9
s. 8.....36, 111
s. 9.....36, 111

PAGE

45 & 46 Vict.
c. 39 (Conveyancing, 1882),
s. 10 530
s. 11 223
s. 12 246
c. 43 (Bills of Sale, 1882),
s. 4 298
s. 5 .....301, 302
s. 6 299
s. 7 318
s. 9 .....264, 297, 304, 306
s. 10 304
s. 11 320
s. 12 305
s. 13 303
s. 15.....317, 318
s. 17 294
s. 20 306
c. 50 (Mortmain, 1882) 12, 328
c. 75 (Married Women's Property, 1882) .....100, 386 *et seq.*
s. 1 6
s. 4 528
s. 5 100
s. 19 .....395, 399, 402

46 & 47 Vict.
c. 49 (Revision, 1883) 72
c. 52 (Bankruptcy, 1883),
s. 47 .....55, 476
s. 55 68
s. 134 124
s. 138 124
s. 140 .....124, 167
c. 61 (Agricultural Holdings, 1883),
s. 29 .....151, 462
s. 31 381
s. 33 377
s. 41 377
s. 44 .....349, 350, 351, 377
s. 45 377
s. 47 377
s. 49 377
s. 50 377
s. 51 377
s. 52 377
s. 55 378
s. 56 378
s. 59 378

47 & 48 Vict.
c. 18 (Settled Land, 1884),
s. 4 .....160, 452, 460
s. 5 .....333, 447
s. 6 .....17, 160, 394, 444
s. 7 .....160, 466
c. 54 (Yorkshire Registry, 1884)..142, 143, 176
c. 71 (Intestates, 1884) 534

PAGE

48 & 49 Vict. c. 26 (Yorkshire Registry, 1885) 143

49 & 50 Vict. c. 27 (Guardianship of Infants, 1886) 532

50 & 51 Vict.
c. 26 (Allotments Gardens Compensation, 1887) 376, 379
c. 30 (Settled Land, 1887) 462
c. 73 (Copyhold, 1887) 24, 69, 128, 245, 281, 527

51 Vict. c. 8 (Customs, 1888)..55, 117, 120

51 & 52 Vict.
c. 21 (Distress, 1888).....348 *et seq.*
c. 42 (Mortmain, 1888) ...12, 97, 201
c. 43 (County Courts, 1888) 348
c. 51 (Lands Charges, 1888)..130, 146, 152

52 Vict. c. 7 (Customs, 1889)....117, 121

52 & 53 Vict. c. 36 (Settled Land, 1889) 453

53 Vict. c. 5 (Lunacy, 1890)....2, 3, 124, 326

53 & 54 Vict.
c. 13 (Bankruptcy, 1890) 68, 350
c. 16 (Working Classes Dwellings, 1890) 13, 14, 201, 202
c. 39 (Partnership, 1890) 546
c. 53 (Bills of Sale, 1890) 319
c. 57 (Compensation, 1890) 379
c. 69 (Settled Land, 1890) ..86, 160, 232, 443, 444, 448, 451, 452, 453, 455, 457, 458, 462, 463
c. 70 (Houses, Working Classes, 1890) 340, 457, 462

54 Vict. c. 8 (Tithe, 1891) 340, 351

54 & 55 Vict.
c. 35 (Bills of Sale, 1891) 319
c. 39 (Stamp, 1891),
s. 5 167
s. 53 194
s. 55 225
s. 56 225
s. 57.....225, 545
s. 58.....161, 225
s. 59 .....77, 225
s. 78 384
s. 89 290
c. 64 (Land Registry, 1891) 142
c. 73 (Mortmain, 1891).....12, 14

55 Vict. c. 10 (Short Titles, 1892) .. 70

55 & 56 Vict. PAGE
c. 11 (Mortmain, 1892) 14
c. 13 (Conveyancing, 1892) ..73, 335
s. 2 .....365, 366, 367
s. 4 .....359, 367
s. 5 368
s. 10 368
c. 58 (Accumulations, 1892) 524

56 & 57 Vict.
c. 21 (Voluntary Conveyances, 1893) 115, 167, 474
c. 53 (Trustee, 1893),
s. 1 230
s. 3 419
s. 5 412
s. 6 419
s. 8 .....228, 229, 230
s. 9 .....229, 413
s. 10 .....417, 418, 421
s. 11 .....420, 421, 422, 480

56 & 57 Vict. PAGE
c. 53 (Trustee, 1893),
s. 13.....17, 18
s. 14.....37, 38
s. 16 .....8, 9, 195
s. 17 .....168, 192, 413
s. 18 502
s. 19 232
s. 20.....193, 414, 465
s. 21.....415, 499
s. 22 408
s. 23 .....36, 111
s. 24 415
s. 25 417
s. 37 420
s. 47.....420, 465
s. 67 256
c. 63 (Married Women's Property, 1893),
s. 1 161
s. 3 498

INTRODUCTION.

Of all the departments into which the business of a solicitor is divisible, none demands a greater amount of that kind of knowledge which is to be derived from the study of books than that which is concerned with Conveyancing and the Law of Real Property. You may by the mere exercise of your powers of reason and judgment, in fact by your common sense, together with a consideration of the statutes bearing on the subject, be able to grasp the principles of what is called Common Law, of Equity, of Criminal, and indeed of any other branch of law; but the Law of Real Property is so intimately connected with the history of our social condition, with its rise in the Feudal System established in the eleventh century, and the gradual decay of that system since that time, that it is impossible to understand the why and the wherefore of that law without a study of history. And, even though the practice of Conveyancing is at the present day to a great extent freed by various statutory enactments from the trammels imposed upon it by Feudalism, the very changes effected by the Legislature cannot be properly understood without a

knowledge of the law as it stood before such changes were made. Moreover, it must be remembered that the office of the Conveyancer is two-fold. Its main concern is with the transfer of property (which for practical purposes is synonymous with landed property) from one person to another; but incidental to that transfer is the important necessity of the investigation of titles, and the ascertaining whether the person who proposes to make a transfer has a legal power to give a good title to the transferee. And in thus investigating a title you will be for a long time yet to come carried over the boundary line which divides the old system of Conveyancing from the new; and in order to bring a competent share of knowledge to your inquiry, it will be absolutely necessary for you to have a clear notion of the nature of the tenure of land and of the methods by which it was transferred in olden times.

There are, of course, many points of the old law which are practically obsolete; there are others, which, though still possessing vitality, will not present themselves to you in the course of an ordinary piece of business, which comes within the sphere of your duties as a Conveyancer. But there are also many of these old points which will have to be borne in mind by you in the most simple and ordinary cases; while some others will only crop up in transactions of a more complicated nature than usual. A recent writer on the Law of Real Property says, "In spite of the numerous simplifications which have been effected during the last half century, the bulk of the law peculiar to Real Property is still large; and it contains

not a few intricate and abstruse technicalities, which are undoubted law, and which would certainly be recognised as such by the Courts. Of these technicalities some, being little used in common practice, only emerge at rare intervals, and under extraordinary circumstances, from their normal obscurity. But others are of more frequent occurrence, and some are in constant use. Nor can the practice of Conveyancing be exercised with prudence and safety, or the recent Acts be completely understood, without a theoretical knowledge of the whole." (Challis on "The Law of Real Property," p. 1.)

It would be but a waste of words to add anything more as to the necessity of being thoroughly acquainted with the theory of the Law of Real Property before you can consider yourself qualified to handle it practically as a Conveyancer. In the following pages we shall assume that you are not entirely unacquainted with the law in theory, but that you have grounded yourself in at least its more important principles. It will be our endeavour to draw your attention to some of the more salient points of the law which it will be necessary for you to have clearly before your mind's eye when engaged in the conduct of any matter in connection with practical Conveyancing, whether it be the superintending of an ordinary sale and purchase, of a loan upon mortgage of realty or personalty, or the preparation of a lease, a settlement, or a will. And though, strictly speaking, the drafting of Partnership Articles does not come within the scope of the office of a property lawyer, yet, as it will form a large part of your business as a Conveyancer,

to this, as well as to deeds of release, disclaimer, and appointments under powers, we shall devote a few words; and in our concluding Part we shall treat of the remuneration to which, as a solicitor, you will be entitled for Conveyancing business.

It will be convenient, then, to imagine you as actually concerned in the transacting of some part of a Conveyancer's business, and to address you as a tutor would his pupil, pointing out to you the various points of law which you must bear in mind upon each particular occasion.

The Student's Conveyancing.

Part I.—VENDORS AND PURCHASERS.

CHAPTER I.

LEGAL DISABILITIES.

Disabilities—

When you are concerned in the sale of any landed property, whether you are acting for the vendor or the purchaser, the first point for your attention will be the legal capacity of the vendor to sell and of the purchaser to purchase. For if a disability exists in either case, it will be useless to proceed any further in the business of the sale.

The disabilities which we shall have to consider may be either such as are imposed by law, or such as arise from the nature of the interest which your client has in the property he proposes to sell or to purchase. We will consider these disabilities under the following heads :—

Classification of.

I. Persons *non compotes mentis.*
II. Infants.
III. Married women.
IV. Aliens.
V. Traitors and felons.
VI. Corporations.
VII. Persons acting in a fiduciary character.
VIII. Promoters, &c. acting under the Lands Clauses Consolidation Act.
IX. Limited owners, *e. g.*, tenants for life, &c.

I. Persons non compotes mentis.

Who such persons are.

Under this title we include idiots, lunatics (*i.e.*, persons found after an inquisition to be insane), and persons of unsound mind not so found.

Conveyance by a person *non compos.*

Generally speaking, a person of unsound mind cannot make a binding conveyance of land. This is certainly the case when the purchaser knows of his insanity. Where the purchaser is ignorant of it and acts in good faith, the case seems doubtful. In *Molton* v. *Camroux*, it was laid down that an executed contract (*e. g.*, a sale), if the parties could not be restored to their original positions, was binding on the person of unsound mind. And in *Beavan* v. *Macdonald*, and more lately still in *Imperial Loan Co.* v. *Stone*, this doctrine was supported. A feoffment by such a person was said to be not void but voidable only; for the livery of seisin which accompanied it made it a very strong kind of assurance, and operated to pass the estate "by wrong," so that such a feoffment might be afterwards confirmed. But though voidable, it was not voidable by the feoffor himself, for it was held that he could not be heard "to stultify himself" (*i.e.*, to plead his own unsoundness of mind). It could be, however, avoided by his heir after his death. But now, by 8 & 9 Vict. c. 106, s. 4, no feoffment can have a tortious operation, so that it would seem a person *non compos mentis* cannot make an absolutely binding conveyance even by feoffment, and it is obviously unsafe to take a conveyance from such a person. The law on the subject does not seem to be very clear, but the following rules may perhaps be enunciated:—

1. The conveyance of the lands of a lunatic, who has been so found after inquisition, must be made by his committee, in conformity with the Lunacy Act, 1890.
2. As to lunatics not so found, and persons *non compotes mentis:* the conveyance of such a lunatic during a lucid interval is valid. (*Hall* v. *Warren.*)
3. The conveyance of a lunatic not during a lucid interval is *primâ facie* voidable; but if made when he was apparently sane and the purchaser had no notice of his insanity, and it is not possible to restore the parties to

their original positions, the court will not set the transaction aside. (*Price* v. *Berrington*; *Elliott* v. *Ince*; *Imperial Loan Co.* v. *Stone*.)

Purchase by a person *non compos*.

A person of unsound mind is competent to purchase land, but cannot be compelled to retain the land if the bargain is in the slightest degree disadvantageous to him. It is questionable if he can avoid the purchase himself, but on his death his heir has the option of waiving or accepting the estate, unless the lunatic has before his death recovered his senses and confirmed the purchase.

Sales by committees of lunatics.

As to persons who have been found by inquisition to be lunatics, it is provided by the Lunacy Act, 1890, s. 117, that his property may be sold, mortgaged, leased, or otherwise disposed of, by order of the Lord Chancellor, or of the judges having jurisdiction in lunacy, for payment of debts, to discharge his estate from incumbrances, or for maintenance past and future. (See hereon, *Re Ware*.) And the committee may, on such order being made, sell, mortgage, let, divide, exchange, or otherwise dispose of the lunatic's land, convey partnership property on a dissolution, sell undivided shares of land, or make partitions or exchanges, grant leases for building and other purposes, &c. Again, committees can convey in certain other cases; thus they can, by leave of the judge in lunacy, make conveyances when the lunatic's property is taken under the Lands Clauses Consolidation Act, 1845, s. 7; and can, with similar leave, exercise in the lunatic's behalf the powers given to sane persons by the Settled Land Act, 1882. (See sect. 62; and see *Re Baggs*.)

II. Infants.

As to Sales by Infants.

Sales by infants:

(a) Of gavelkind lands.

At common law the conveyance of an infant is voidable, *i. e.*, when he comes of age he can avoid it, or, if he dies a minor, his heir may avoid it. And even a feoffment by an infant is voidable, except in the case of gavelkind lands, which may be, or at least might have been, alienated by a minor at fifteen years of age or upwards by a feoffment where livery of seisin was made by him in person; but this power to alienate by feoffment by custom of gavelkind must now be doubted, since it is a

rule that no custom can prevail against an act of parliament, and, as shown *infra*, all lands of an infant are by statute deemed to be *settled lands*, and the infant is deemed to be tenant for life thereof, and where this is so, the lands can only be sold, leased, &c., by the trustees of the settlement (if any), and if none, by the person appointed by the court, and apparently, not even though of gavelkind tenure by the infant himself. (See sect. 5 of the Settled Land Act, 1882.) Various statutes have made provision for the transfer of the lands of infants in certain circumstances. Thus, by the Infants' Marriage Settlement Act, 1855, provision is made, as will appear more fully hereafter, when we are treating of settlements, whereby an infant on marriage can, with the court's leave, make a binding settlement of his or her property. And under the Lands Clauses Consolidation Act, 1845, when their lands are compulsorily required, their guardians can convey. (Sect. 7.) And by sect. 41 of the Conveyancing Act, 1881, when an infant is seised in fee of land, or for any leasehold interest at a rent, such land is to be deemed a settled estate within the Settled Estates Act, 1877. The result is, that under sect. 16 of the latter act the court can authorize a sale of the land, and under sect. 22 direct what person shall execute the deed of conveyance. Again, by sect. 59 of the Settled Land Act, 1882, when an infant is seised of or entitled in possession in his own right to land, he is to be deemed a tenant for life thereof within that act. The act empowers a tenant for life to sell settled land (sect. 8) under certain conditions, and, if he be an infant, enables the trustees of the settlement, or, if there are none, then some one appointed by the court, to exercise all the powers the tenant for life could exercise were he of full age.

(b) Under the Infants' Marriage Settlement Act, 1855.

(c) Under the Lands Clauses Act, 1845.

(d) Under the Conveyancing Act, 1881.

(e) Under the Settled Land Act, 1882.

(f) Under powers of appointment.

An infant cannot exercise a power of appointment over real property, except a power collateral (see *Hearl* v. *Greenbank*); but when arrived at years of discretion he can, by deed (but not by will, owing to 1 Vict. c. 26, s. 9), exercise a power of appointment over personal property, whether the power is a power collateral, or a power appendant, or a power in gross. (See *In re D'Angibau*, *Andrews* v. *Andrews*.)

If, then, your client makes a purchase from an infant, recourse should be had to the Settled Land Acts.

Conveyances to Infants.

Conveyances to infants.

An infant may purchase land, as it may be for his benefit; but the conveyance to him is voidable, and if he dissents from it on attaining full age it becomes void; or, if he dies under age without having dissented, his heir may nevertheless avoid it. An infant cannot enforce specific performance of a contract for the purchase of land, for the remedy is not mutual, as it could not be enforced against him; if, however, after contracting to purchase and paying a deposit, he refuses to complete on attaining majority, he cannot recover the deposit, except where it was obtained from him by fraud. (*Flight* v. *Bolland;* and see *Valentini* v. *Canali.*)

Whether the Infants' Relief Act, 1874, which makes ratification, on majority, of contracts entered into during infancy valueless, applied to contracts relating to the sale and purchase of lands, and whether, consequently, such contracts could still be ratified on majority, was for some time a matter of doubt; but from the recent cases of *Duncan* v. *Dixon*, and *Whittingham* v. *Murdy*, it would seem that the act has no application to such contracts.

Contracts to sell and purchase by infants.

In *Duncan* v. *Dixon*, Kekewich, J., held that a contract to settle property made by an infant on his marriage was still voidable, not void, and expressed his opinion that the Act of 1874 only applied to the three classes of contracts therein specified—*i. e.*, (1) contracts for the repayment of money lent; (2) contracts for goods supplied; (3) accounts stated—and that contracts of other classes remained unaffected. The contract, however, was not, in this case, a contract to settle land; but if a contract to settle personal estate be not within the act, *à fortiori* a contract dealing with land is not. (See also *Edwards* v. *Carter.*) In *Whittingham* v. *Murdy*, Hawkins, J., held that if an infant becomes a member of a building society, and continues a member after attaining majority, he is liable for arrears of contribution under the society's rules; the learned judge remarking that such a contract relates to an interest in land of a permanent character, which was presumably for the benefit of the infant, and it was the duty of the infant, if he wished to repudiate, to do so within a reasonable time after coming of age, thus clearly implying

that the Infants' Relief Act does not apply where the contract affects an interest in land.

Edwards v. *Carter.*

In *Edwards* v. *Carter*, *supra*, it was laid down that a person after majority may be shown to have confirmed a contract made during infancy, without it being necessary for the person who alleges the confirmation to prove that the infant was fully aware of the facts, and of his rights, as is necessary in the case of acquiescence or election.

III. Married Women.

As to Sales to a Married Woman.

Sales to married women.

Since the Married Women's Property Act, 1882, a married woman may acquire, hold, and dispose of separate property like a *feme sole* (sect. 1, sub-sect. 1). The old law was that she was not absolutely incapacitated from purchasing land, but her husband during her life, and even herself after his death, and her representatives after her death, might avoid the purchase if not made out of her separate estate. Since the Act of 1882, she may enter into any contract, but will be liable thereon only in respect of and to the extent of the separate property free from restraint, and this liability attaches by virtue of the Married Women's Property Amendment Act, 1893, although she possessed no separate estate at the date of the contract, provided the contract was made after 5th December, 1893. If made before that date the contract will be void, unless at the time of entering into it the woman possessed separate estate, which the court will presume she intended to charge with the fulfilment of the contract (56 & 57 Vict. c. 63, s. 17). (See *Deakin* v. *Lakin; Palliser* v. *Gurney; Leake* v. *Driffield; Bonner* v. *Lyon; Braunstein* v. *Lewis; Loibl* v. *Fraser.*) This is so, whatever the date of her marriage may be.

As to Sales by a Married Woman.

Sales by a married woman.

At common law a married woman could not dispose of her lands, except with her husband's concurrence, nor otherwise than by fine or recovery, after a private examination to ascertain that her act was voluntary. The statute 3 & 4 Will. 4, c. 74, substituted an ordinary deed for a fine, &c., but still required

3 & 4 Will. 4, c. 74.

the husband's concurrence and a due acknowledgment of the deed under the act. This act (as modified by sect. 7 of the Conveyancing Act, 1882, in respect to the manner of taking the acknowledgment) still applies to property which is not hers as her separate estate, either by virtue of some settlement, or by virtue of the Married Women's Property Act, 1882, or otherwise. (See *Johnson* v. *Johnson*, *infra*, as to the disposition of lands coming to a married woman under the Married Women's Property Act, 1870, for her separate use.) Unfettered power to dispose of her property will depend on the date of her marriage. If this was prior to the 1st January, 1883, she may convey like a *feme sole* all property to which her title, whether vested or contingent, and whether in possession, reversion or remainder, first accrues *after* the 31st December, 1882. (*Reid* v. *Reid*.) If her marriage was subsequent to the 31st December, 1882, she may also convey, like a *feme sole*, all her property; for all property which belongs to her *at the time of marriage*, or is acquired by or devolves on her after marriage, belongs to her for her separate use. So that if the marriage was subsequent to 31st December, 1882, she may convey without restriction, and her husband need not be joined. If she was married before the 1st January, 1883, you must inquire if the property she proposes to sell accrued to her before or after the 31st December, 1882. If the *first* title to it accrued after that date (see *Reid* v. *Reid*), then she can sell like a *feme sole*; if the first title accrued before that date, then there are several further questions you will have to put. The first should be, Was the property limited to her in terms to her separate use? If this is so, she can again convey her equitable interest like a *feme sole* (see *Taylor* v. *Meads*), unless she is restrained from anticipation, in which case she will have no power to dispose of the property until she becomes a widow (*Tullett* v. *Armstrong*), or unless the court allows the alienation under sect. 39 of the Conveyancing Act, 1881, as it may where it is for her benefit and the court thinks there are reasons for doing so. (*Tamplin* v. *Miller*; *Hodges* v. *Hodges*; *Ex parte Thompson*; *In re Wood*; *Re Warren's Settlement*; *Harris* v. *Harford*; and *In re S.'s Settlement*.) If you find that the property has not expressly been given to her for her separate use, you must then inquire if other circumstances

A married woman may convey without a deed acknowledged:

(a) Separate property under the Act of 1882;

(b) Separate property under a settlement:

exist which give her power to convey as a *feme sole*. With regard to lands which came to a woman married after 8th August, 1870, in such a way that the rents and profits belonged to her for her separate use under sect. 8 of the Married Women's Property Act, 1870, it has been held that they can only be conveyed by an acknowledged deed, and with the husband's concurrence, and not by the woman as a *feme sole*, since the act only makes the rents and not the *corpus* separate property. (*Johnson* v. *Johnson*.) If she has a power of appointment over the property, she can exercise it without her husband's concurrence. She may also convey as a *feme sole* when she is a bare trustee. (See Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 16. As to what constitutes a bare trustee, see *post*, p. 20.) Again, if she has obtained a judicial separation, or a protection order under the Matrimonial Causes Acts, 1857 and 1858, or an order in the nature of a judicial separation under the Matrimonial Causes Act, 1878, she may dispose as a *feme sole* of any property which may devolve on, or be acquired by, her during the separation, and even if she cohabits with her husband again, all property which she may be entitled to when such cohabitation takes place will be hers for her separate use, unless she and her husband have, whilst still separate, made some agreement in writing to the contrary.

(c) Property over which she has a power;
(d) Property of which she is a bare trustee;
(e) Property acquired after—
(1) Judicial separation;
(2) A protection order.

Requisites to sale by a married woman when not regarded as a *feme sole*.

In cases where she cannot deal with her property as a *feme sole*, her husband must be required to join in the conveyance, and the deed will have to be acknowledged under the Fines and Recoveries Act, as altered by sect. 7 of the Conveyancing Act, 1882. The court has power, under sect. 91 of 3 & 4 Will. 4, c. 74, to dispense with the husband's concurrence, but without prejudice to his rights; and this was done in the case of *Ex parte Caine*, where the husband was living apart from the wife, and refused to join in unless he first received 50*l*.

Acknowledgment, how taken:

The acknowledgment is now taken by one instead of two commissioners, and no registration of the deed is required, but a declaration indorsed upon the deed, and duly signed by the commissioner, showing that the acknowledgment was properly taken, is all that is required to complete the title of the purchaser. (See sect. 7 of the Conveyancing Act, 1882, and Rules drawn up thereunder, and *post*, Chap. VIII., sect. iii.)

The above remarks apply more especially to the wife's freehold lands. Copyholds and leaseholds come within the Married Women's Property Act under the same circumstances as freeholds do. As to copyholds not within the act, and not otherwise belonging to the wife for her separate use, the husband and wife can convey her legal or equitable interest by a surrender by both, taken after a separate examination of the wife by the steward, and her equitable interest therein can be conveyed by an ordinary deed acknowledged, as in the case of freeholds. As to the wife's chattels real, she cannot dispose of them during her husband's life, unless they fall within the Acts of 1870 or 1882, or otherwise are hers for her separate use; for, at common law, they vest in the husband, and he can dispose of them in any way except (where she survives him) by will. If, however, the interest of the wife, not being separate estate, is reversionary, then the lease can only be disposed of by the husband alone, if the reversion is one which may possibly fall into possession during coverture. If the reversionary interest is of such a character that it cannot possibly fall into possession during coverture, a deed acknowledged under 3 & 4 Will. 4, c. 74, as read with sect. 7 of 45 & 46 Vict. c. 39 (the Conveyancing Act, 1882), would be necessary, *e.g.*, a lease coming to the woman on the death of her husband. (*Donne* v. *Hart.*)

(a) When required for copyholds:

(b) Leaseholds.

A deed acknowledged, or an acknowledgment before the steward of a manor, as the case may be, is thus still necessary in the following cases:—

Summary of cases in which deed acknowledged necessary.

(1) To convey freehold or copyhold lands acquired before 1st January, 1883, by a woman married before that date, and not settled to her separate use. (See *Johnson* v. *Johnson*, *supra.*)

(2) To assign reversionary interests in leasehold property so acquired, if there is no chance of the reversion falling in during coverture.

(3) To convey lands of which she is a trustee (unless she is a "bare" trustee within sect. 16 of the Trustee Act, 1893), since the Act of 1882 does not appear to authorize a conveyance of lands of which a married woman is a trustee as if she were single.

(4) To disclaim lands; the Act of 1882 not appearing to apply to a disclaimer. (8 & 9 Vict. c. 106.)

(5) To dispose of a reversionary interest in pure personal property, the title to which was acquired by a woman married before 1st January, 1883, between 1st January, 1858, and 31st December, 1882 (inclusive), and not settled on the woman for her separate use. (20 & 21 Vict. c. 57; *Reid* v. *Reid.*)

Statutes which empower persons under disability to alienate their property generally confer such powers on married women, *e. g.*, the Lands Clauses Consolidation Act, 1845, s. 7.

As to the husband's estate by curtesy.

It is not necessary to take into consideration the husband's curtesy as an obstruction to a married woman's conveying, for her conveyance will defeat his right to it. Incidentally, however, we may remark that, in the event of intestacy, curtesy attaches to the wife's separate property in equity (*Cooper* v. *Macdonald*), and also to property within the Act of 1882. (*Hope* v. *Hope.*)

IV. Aliens.

Sale by and conveyance to aliens.

Your client now will be perfectly safe in conveying to or taking a conveyance from an alien. For, by the Naturalization Act, 1870, real and personal property of every description may be taken, held, acquired, and disposed of in the same manner as by a natural-born British subject, and a title to such property may be derived through, from, or in succession to an alien, just as though, &c. a natural-born British subject. But sect. 14 provides that nothing in the act shall qualify him to be owner of a British ship, or of any share therein.

V. Traitors and Felons.

The old law as to forfeiture.

Before the 4th July, 1870, if a man was attainted of treason, he forfeited his land to the Crown for ever, and if he was attainted of felony—*i. e.*, sentenced to death or judged outlaw on a capital offence—his land was forfeited to the Crown for a year and a day, and then escheated to his feudal lord; and further, though the forfeiture only arose on attainder, it was held that it related back to the time of the offence, so that all intermediate dealings by the attainted person with such pro-

perty were void. So that a purchaser from a man who had committed such a crime would, when the man was attainted, lose his purchase, and this even if he was without notice. Traitors and felons could, however, alienc their chattels, real and personal, provided they did so before conviction.

The present law.

The law on the point is, since the Felony Act, 1870, put on a new footing, and no confession, verdict, inquest, conviction, or judgment of or for any treason or felony will now cause any attainder or corruption of blood or any forfeiture or escheat. (33 & 34 Vict. c. 23.) This act did not affect the forfeiture consequent on outlawry (sect. 1), but outlawry in civil actions has been since abolished by 42 & 43 Vict. c. 59, and is hardly ever resorted to in criminal proceedings. The convict cannot aliene during the period of his sentence, but provision is made for the appointment of an administrator of the property of traitors and felons, in whom all the property the convict had at the time of conviction, or which he afterwards acquires, vests, and who has absolute power to let, sell, mortgage, convey, and transfer any part of such property as he thinks fit. An interim curator may be appointed by justices to act where an administrator has not been appointed.

A felon's lands may be taken for debts.

Although a convicted felon cannot convey his lands himself, yet his lands may be taken compulsorily from him for the purpose of paying his debts. Thus, he is deemed capable of paying a debt claimed by a debtor's summons (now bankruptcy notice) served after his conviction, and if he does not pay he commits an act of bankruptcy. (*Ex parte Graves*, *Re Harris*.)

VI. Corporations.

Conveyances to corporations cause a forfeiture unless, &c.

It is provided by the Mortmain Act, 1888 (51 & 52 Vict. c. 42), that land shall not be assured to, or for the benefit of, or acquired by or on behalf of, any corporation in mortmain, otherwise than under the authority of a licence from the Queen, or of a statute for the time being in force. If this provision be infringed, the land is forfeited to her Majesty from the date of the assurance, subject to this, that if the land is held of a mesne lord the mesne lord may enter on and hold the land at any time within twelve months of the assurance. The same act empowers

her Majesty to grant to any person or corporation a licence to assure in mortmain land, in perpetuity or otherwise, and to grant any corporation a licence to acquire land in mortmain, and to hold the land in perpetuity or otherwise.

Exceptions: (a) Incorporated charities;

To the rule that a licence to hold lands is required by corporations, there are the following exceptions: incorporated charities may, under certain circumstances, with the consent of the Charity Commissioners, hold land without a licence under 18 & 19 Vict. c. 124; and so may corporations formed for public or charitable purposes under 33 & 34 Vict. c. 34; and 35 & 36 Vict. c. 24, enables trustees of certain charities to be incorporated, and yet hold and convey lands in the same manner as trustees might do without such incorporation. Joint stock companies, registered under the Companies Act, 1862, may hold lands subject to this, that no company whose objects do not involve the acquisition of gain can, without the sanction of the Board of Trade, hold more than two acres of land. By the custom of London churchwardens are a corporation to purchase land; and churchwardens generally can by statute purchase lands for specified purposes—*e. g.*, for poor law and educational purposes. Municipal corporations may, under 45 & 46 Vict. c. 50, purchase and hold land to the extent of five acres for buildings for borough purposes, and the Treasury may authorize them to acquire further land; and by 45 & 46 Vict. c. 21, corporations can grant, convey, or enfranchise, under certain restrictions, land for the purposes sanctioned by the Places of Worship Sites Act, 1873; but these corporations cannot sell their land except with the approval of the Treasury; they may, however, make leases for not exceeding thirty-one years without such approval.

(b) Public and charitable corporations;

(c) Charitable trustees;

(d) Registered companies;

(e) Churchwardens;

(f) Municipal corporations: District Councils (Local G A 1894 §14 ss 7)

(g) For Places of Worship Sites Act, 1873.

Gifts and conveyances to charities.

When your client wishes to convey land to some charitable use, you will have to consider the provisions of the Mortmain and Charitable Uses Act, 1888—as amended by the Mortmain Acts, 1891 and 1892—(an act which repeals 9 Geo. 2, c. 36, and most of the other statutes on the subject, and consolidates the law).

Your client may wish—(a) to make a free gift of land to the charity, or (b) to sell land to it for valuable consideration. In some cases he can either make a gift of land or sell it to the charity without observing the formalities of the Act of 1888.

Thus, gifts of land are allowed either by deed or will, without any other formalities beyond those required in conveying to individuals, in favour of the following institutions :—

Institutions to which Mortmain Acts do not apply.

(1) The Universities of Oxford and Cambridge, London, Durham, and the Victoria University, and any of their colleges; and the colleges of Eton, Winchester, Westminster, and Keble College.
(2) The Foundling Hospital, 17 Geo. 2, c. 29.
(3) The British Museum, 26 Geo. 2, c. 22; 5 Geo. 4, c. 39.
(4) The Marine Society, 12 Geo. 3, c. 67.
(5) The Bath Infirmary, 19 Geo. 3, c. 23.
(6) Queen Anne's Bounty, 43 Geo. 3, c. 108.
(7) Greenwich Hospital, 10 Geo. 4, c. 25.
(8) The Royal Naval Asylum, 51 Geo. 3, c. 105.
(9) Seamen's Hospital Society, 3 & 4 Will. 4, c. 9.
(10) St. George's Hospital, 4 Will. 4, c. 38.
(11) Ecclesiastical Commissioners (in respect of gifts, &c., for endowment of clergy, or building or repairing churches), 14 & 15 Vict. c. 97.

Special provisions as to parks, &c.

And special provision is made by the 1888 Act (a continuance of the law as laid down by the now repealed Public Parks Act, 1871), with a view to encourage the giving of lands for public parks, &c., that land may be given by deed or will, without complying with the usual formalities, for the purpose of a public park, museum, or schoolhouse; but the deed or will, when not supported by value, must be executed twelve months before the donor's death, and the document must be enrolled with the Charity Commissioners within six months of execution in the case of a deed, and within six months of the testator's death in the case of a will. Moreover, in cases of gifts by will, the acreage given must not, for a public park, exceed 20 acres, for a museum 2 acres, and for a schoolhouse 1 acre.

Working Classes Dwellings Act, 1890.

Further, by the Working Classes Dwellings Act, 1890 (53 & 54 Vict. c. 16), lands may be conveyed by deed or will without compliance with the provisions of the Act of 1888, if the object of the conveyance is to provide dwellings for the working classes of populous places, provided that no more than 5 acres be given *by will*, and that the deed or will be enrolled with the Charity Commissioners, the time for enrolment being, in the

case of a deed, within six months of its execution, and in the case of a will within six months after probate thereof.

Mortmain Act, 1891.

Again, by the Mortmain and Charitable Uses Amendment Act, 1891 (54 & 55 Vict. c. 73), land may be given by will for any charitable use under certain conditions. (See *post*, p. 15.)

Mortmain Act, 1892.

Lastly, by the Mortmain Act, 1892 (55 & 56 Vict. c. 11), lands may be given by deed (though not by will) to any local authority (as defined in the act) for any purpose or purposes for which such authority is empowered by any act of parliament to acquire lands, provided such deed is enrolled with the Charity Commissioners within six months of execution.

Requisites to a valid gift to a charity generally.

In any other cases than the above, a *free gift of land* to a charity must conform to the requirements of the Act of 1888. These requirements are as follows:—

(1) The conveyance must be by deed.

(2) The deed must be executed twelve months before the donor's death, inclusive of the days of making of the assurance and of the death.

(3) Two witnesses must attest the deed.

(4) It must be enrolled within six months of execution in the Central Office of the Supreme Court of Judicature.

(5) It must take effect in possession immediately from the making thereof.

(6) It must be without any power of revocation, reservation, condition, or provision for the benefit of the donor or of any person claiming under him.

With regard to head (6), the 1888 Act allows the reservation of a nominal rent, of minerals, easements, of covenants as to buildings, streets, or nuisances, or similar provisions for the enjoyment as well of the premises conveyed as of adjacent premises, or any right of entry on non-payment of rent or breach of covenant, or similar stipulations for the donor's benefit.

Requisites to a valid sale to a charity generally.

Secondly, with regard to sales to charities for valuable consideration. If these are made in good faith and for full and valuable consideration, *the deed need not be executed twelve months before the vendor's death, but all the other formalities set forth above are to be observed.* "Valuable consideration" may consist wholly or in part of a rent, rent-charge or other annual payment in perpetuity or term of years, or other period,

with or without a right of re-entry for non-payment, or it may consist of a sum part paid in a lump and part reserved as above. The deed in this case also must be enrolled, but the omission to enrol it may be cured; for the 1888 Act provides that where there has been an omission to enrol the deed within the proper time from ignorance or inadvertence, or through the destruction or loss of the deed by time or accident, the High Court may order the instrument to be enrolled; in which event, *if it was made in good faith and for valuable consideration*, and to take effect immediately without revocation or reservation, and if at the time possession or enjoyment is being held under the assurance, then this subsequent enrolment will have the same effect as if it had been made within the requisite time. Further, if the instrument omitted to be enrolled in proper time has been destroyed or lost by time or accident, and the trusts thereof sufficiently appear by a copy or abstract or some subsequent instrument, such copy, &c., may be ordered to be enrolled. And none of the provisions of the act apply to an assurance (otherwise than by will) to trustees of religious or educationary bodies of land not exceeding two acres, to be used for the erection of a building for the purposes of such bodies, provided the assurance be made in good faith and for full and valuable consideration. So that you can sell two acres of land to institutions of this sort without any formalities. The trustees may, if they think fit, enrol the deed, but are not bound to do so.

Sales to charities.

Sales to religious bodies.

The stringent law relating to the gift of lands to charitable uses, originally laid down by 9 Geo. 2, c. 36, and now re-enacted by the consolidating statute of 1888, whereby, in effect, subject to numerous exceptions, lands cannot be given to such uses by will, has been considerably modified by the amending Act of 1891 (54 & 55 Vict. c. 73), whereby it is in effect provided, that "land" shall not include money to be laid out in land, nor yet an interest in land, which therefore, now, though not formerly, can be given by will to a charitable use, and further, the act allows lands themselves to be given by will for charitable uses, but subject to this, that the lands are to be sold within a year after the testator's death, unless, indeed, a judge of the High Court, or the Charity Commissioners, being satisfied that the land assured by will to or for the benefit of any charitable use

The amending Act of 1891.

is required for actual occupation for the purposes of the charity, and not as an investment, order the retention of the land. With regard to money directed by will to be laid out in land for the benefit of some charitable use, the statute provides that, unless an order is made by the judge or Charity Commissioners that the acquisition of the land is required for actual occupation for the purposes of the charity, the money shall not be so laid out, but shall be held for the charitable use as if no such direction to lay it out in land had been given.

This amending Act of 1891 applies to wills of testators dying after 5th August, 1891, even though the will was made prior to that date. (*Re Bridger*, *Brompton Hospital* v. *Lewis*.)

Mortgages to corporations.

In spite of the Mortmain Acts, corporations and trustees, holding money in trust for public or charitable purposes, may invest on mortgage of real securities, but they cannot foreclose; and on applying to the court to enforce their security, will only obtain a decree directing a sale, and not a foreclosure decree. (33 & 34 Vict. c. 34.) A mortgage to such trustees need not comply with the formalities of the Mortmain Act.

Purchases of copyholds.

Lastly, you must bear in mind that the lord of the manor cannot be compelled to admit as tenant on the rolls a corporation, and therefore, if your client, a corporation, purchases copyholds, you must take care that they are surrendered to some nominee of the corporation, and that the nominee execute a declaration of trust in favour of the purchasing corporation.

VII. Persons acting in a Fiduciary Capacity.

Trustees' power to sell depends on trust instrument.

If your client is purchasing from a trustee, you must ascertain that he has power to sell by consulting the trust instrument. The statutes relating to trustees' powers of sale only apply in cases where they have selling powers under their trust instruments. If trustees *have* a power of sale they may exercise their discretion as to the time when they will sell, and the court will not interfere with them. (44 & 45 Vict. c. 41, s. 35; *Jones* v. *Blake*.)

Where testator charges his lands with

There is one case in which trustees and executors are empowered to sell land by statute; this is by virtue of sects. 14—17

of 22 & 23 Vict. c. 35, which confer on trustees and executors under wills powers of sale when the testator has charged his lands with the payment of debts or legacies. If he has devised his estate so charged to his trustee for his whole interest therein, and has made no express provision for raising the debts, &c. out of the estate, the trustee may sell the land; if he has not vested the land in the trustee for his whole estate and interest, then the executor may sell. And purchasers or mortgagees are not required to inquire whether the powers given by the act have been duly exercised by the person to whom they are given. It has been decided that this act does not apply to administrators even with the will annexed. (*Re Clay and Tetley.*) In *Tanqueray-Willaume* v. *Landau*, it was held that where executors are directed to pay the testator's debts, and there is a gift of all his realty to them, whether beneficially or in trust, the debts are payable out of the estate so given, and the executors can sell. (See also *West of England Bank* v. *Murch; Re Wright's Trustee; Ashford* v. *Munn; Kitford* v. *Blaney.*)

debts and legacies, the power of sale is statutory.

Trustees in selling may now sell the surface of the land apart from the minerals, or *vice versâ*, without any special power in that behalf, provided the leave of the court is obtained on application made in a summary way. (See Trustee Act, 1893, s. 44, which supersedes 25 & 26 Vict. c. 108, now repealed.)

The power to sell gives the right to sell lands without minerals, and *vice versâ*.

Trustees having a trust for sale, or being empowered, may, by sect. 13 of the Trustee Act, 1893, sell or concur in selling the land in one plot, or in lots, and by public auction or private contract, without responsibility for loss, &c. But this section does not confer a power of sale, nor justify the trustees in selling subject to conditions of sale of a stringent character which the state of the title does not call for. (See *post*, p. 37.)

56 & 57 Vict. c. 53, s. 13.

Since the Settled Land Act, 1882, trustees who are merely empowered to sell lands the subject of a strict settlement must obtain the consent of the tenant for life (sect. 56) (see, however, *In re Bedingfield and Herring's Contract*); but if there are several persons forming together one complex tenant for life, then the consent of any one of those persons is sufficient. (Settled Land Act, 1884, s. 6 (2).) And if this consent is given, the minerals may be sold apart from the land, and *vice versâ*, without the necessity of obtaining the court's consent

As to the power of sale conferred on trustees by the Settled Land Act, 1882.

under sect. 44 of the Trustee Act, 1893. If the lands are vested in trustees *upon an absolute trust for sale*, then the consent of the tenant for life is not necessary to the sale thereof. (See sect. 63 of the Settled Land Act, 1882, and sect. 6 of the Settled Land Act, 1884; and see *Taylor* v. *Poncia; Re Earle and Webster.*)

As to trustees selling under a power after the beneficiaries have become absolutely entitled, see *Re Sudeley and Baines' Contract.*

Mortgagee's power of sale.

Again, in purchasing from a mortgagee, you will have to refer to the mortgage to ascertain the nature of his power of sale; but even if the mortgage gives no power to sell, the mortgagee will have one by virtue of Lord Cranworth's Act, if his mortgage deed is dated between the 28th August, 1860, and the 31st December, 1881, and by virtue of the Conveyancing Act, 1881, if the mortgage was executed after that date. But, notwithstanding these statutes, the mortgage itself ought, strictly speaking, to be referred to; for though it is not likely to happen, yet it is possible that the powers given by them may be expressly excluded or altered.

How a fiduciary relationship affects the power of sale.

In ascertaining the powers of the parties to sell, you may in some cases have to take into consideration the relation in which the parties stand to each other. For a fiduciary relationship between them may have an important bearing on the sale. The following examples of this are worthy of your attention:—

(1) Parent and child;

(1) A parent can purchase from his child, but the sale may be impeached unless it is reasonable and the most scrupulous good faith has been observed.

(2) Guardian and ward;

(2) A guardian cannot purchase from his ward while the relationship of guardian and ward is still subsisting. And even where the ward has come of age it will be dangerous for the ex-guardian to purchase from him, if but a short time has elapsed since the ward attained his majority; for the onus will be laid on the guardian of showing that he has made a fair bargain and has reaped no advantage from the influence his former position with regard to the ward must be presumed to have given him.

(3) Minister and member of congregation;

(3) In the same way, a conveyance from one of his flock to a minister of religion is liable to be set aside on the

ground of undue influence. (See hereon *Morley* v. *Loughman*.)

(4) A client may convey for valuable consideration to his solicitor; but it will lie on the latter, if the transaction is questioned, to show the propriety thereof, and that he kept the client at arm's length. (*Booth* v. *Boutflower*.) And the solicitor must not purchase in the name of a trustee or agent, for no such sale can stand. (*Gresley* v. *Mousley*; *McPherson* v. *Watt*; *Tomson* v. *Judge*.) A gift *inter vivos* from a client to solicitor is void. (*Morgan* v. *Minett*. But see *Tyars* v. *Alsop*, from which it would appear that though a gift *inter vivos* to a solicitor by his client is in the first instance void, and so incapable of ratification, yet if subsequently, and after the relationship is over, the *quondam* client deliberately, and acting under separate advice, agrees to abide by what he has done, the gift could not thereafter be impeached.) A gift by will to a solicitor, on the other hand, stands on the same footing as a gift to any other person, and can only be set aside if undue influence be proved. (4) Solicitor and client;

(5) A conveyance from a patient to his medical adviser stands in much the same position as a conveyance from a client to his solicitor, though a gift by a patient is not necessarily void; and it will be upheld if it is shown that the patient acted as a free agent, and had separate and independent advice. But such a gift is watched most jealously by the court. (See *Wallis* v. *Routh*.) (5) Medical man and patient;

(6) An agent selling property of his own to his principal must disclose the fact. And if he purchases his principal's property in the name of some other person, his principal may afterwards, on discovering the fact, repudiate the sale, and claim any profit the agent may have made. All secret profits made by an agent belong to the principal, though the latter has no right —as a *cestui que trust* has—to follow such profits and claim any investments that may have been made therewith. (*Lister* v. *Stubbs*.) (6) Principal and agent;

(7) Trustee and *cestui que trust*;

(7) A trustee for sale cannot safely purchase from himself. The sale is not void *ab initio*, but it is liable to be set aside on the *cestui que trust* applying to the court within a reasonable time. Again, a trustee cannot as a rule purchase any portion of the trust property from the *cestui que trust*. The result of various decisions on the point would seem to show that such a purchase would stand good in the following circumstances:—(a) If the trustee will give more for the trust estate than any other person; in other words, if he will give a fancy price for it; (b) if the offer to sell proceeds from the *cestui que trust*, and the trustee pays the ordinary value in the market, keeping the *cestui que trust*, as it has been styled, at arms' length; (c) if the sale is by public auction, and the trustee has the leave of the court to bid; (d) in all cases in which the purchaser is a bare trustee only, *i.e.*, a trustee who has no duties to perform beyond the simple obligation to convey the land to or according to the direction of his *cestui que trust* whenever required to do so, or to convey in accordance with a direction of the court (*Dockwra* v. *Faith*), and in the meantime to permit the *cestui que trust* to receive the rents and profits. A *re*-purchase by a trustee of the trust property is *primâ facie* good. (*Postlethwait* v. *Rickman*.)

(8) Mortgagor and mortgagee.

(8) A mortgagee with a power of sale, though he is not in the exercise of his power a trustee for the mortgagor, and is at perfect liberty to sell when he likes and as he likes without consulting the interests of the mortgagor or of any subsequent incumbrancer (see *Warner* v. *Jacob*; *Tomlin* v. *Luce*), to whom, however, he is responsible as a trustee for any surplus there may be after payment of all that is due to him for principal, interest and costs (*West London Commercial Bank* v. *Permanent Insurance Society*, and see *Thorne* v. *Heard*), yet he cannot sell to himself under the power, though he can sell to a company in which he holds shares. (*Farrar* v. *Farrars*.) Moreover, he may purchase the equity of redemption in property from the mortgagor and take a conveyance from him, for in this case there is only the

relation of dry trustee and *cestui que trust* between them. (*Knight* v. *Majoribanks.*)

VIII. Promoters, &c., acting under the Lands Clauses Consolidation Act.

Compulsory sales and purchases under the Lands Clauses Act.

The object of the statute.

You may be called upon to act for a vendor who has received a notice to treat, or for purchasers who are buying under the compulsory powers given by the Lands Clauses Consolidation Act, 1845. The chief object of that statute is to encourage enterprise, by enabling the promoters of any undertaking of a public nature to acquire land from individuals who either will not, or who by reason of some disability cannot sell. It enables all parties entitled to land or to any estate or interest therein to sell the same, and to enter into all necessary agreements with that object. Particularly it enables corporations, tenants in tail or for life, married women seised in their own right or entitled to dower, guardians, committees of lunatics and idiots, trustees of charities, executors and administrators, and generally all parties for the time being entitled to the receipt of the rents and profits of any such land in possession, or subject to any estate in dower, or to any lease for life or for lives and years or for years, or any less interest, to sell their lands, and (with the exception of married women entitled to dower and lessees for life, &c.) to sell them not only on behalf of themselves, but also on behalf of persons entitled in reversion, remainder, or expectancy after them, so as to defeat the estates of such parties; and it enables married women and all owners of land who are under disability to deal with the land as if they were respectively under no disability. Though corporations generally are empowered to sell, municipal corporations must still get the consent of the Treasury (sect. 15), and committees of lunatics should obtain the permission of the Lord Chancellor. (*Re Wade.*)

Summary of procedure under the act.

The proceedings under this act are briefly as follows:—When the promoters require any land they must first give a notice to treat under the act.

The notice to treat.

This notice specifies what lands they desire to take. An owner who is competent to deal with his lands freely can, of course, make any agreement he likes with them. But it is when the owner for the time being is under disability or refuses to treat, that the provisions of the act are more especially of use.

In such cases the value of the land is first to be ascertained, either by the verdict of a jury or by arbitration, or by a valuation. The compensation or purchase-money, having been determined in one of these ways, is, in the case of disability, to be dealt with in different ways, varying with its amount. If it exceed 200*l.*, it must be paid into the bank in the name of the paymaster-general, and it will there remain until applied by the court, in (a) the purchase or redemption of the land tax, or the discharge of incumbrances affecting the land sold, or other lands settled along with it but not taken; (b) the purchase of other lands to be settled in the same manner as the lands sold; (c) the replacing of buildings if buildings have been compulsorily taken; (d) the payment to any party absolutely entitled to the money; (e) in some one or more of the ways in which capital money can be invested under the Settled Land Acts, 1882 to 1890 (see sect. 32 of 1882 Act). If the purchase-money is under 200*l.* but over 20*l.*, it can either be dealt with in the same way as sums over 200*l.*, or else, if the promoters agree, it may be paid to two trustees for the party under disability, the promoters approving of the trustees selected; in this case the trustees will apply the money in the same way as if it had been paid into the bank, but no order of the court need be obtained by them. If the purchase-money does not exceed 20*l.*, it can be paid to the parties entitled to the rents and profits of the lands, or, if these are under disability, to their guardians, husbands, committees, or trustees, as the case may be.

The amount of compensation.

How applied.

The promoters, having paid the money in accordance with the act, can require the vendor to convey to them, or as they direct. In default thereof, or if the vendors cannot adduce a good title, the promoters can vest in themselves all the estate and interest of the vendors in the land, and also the interests of those persons on whose behalf the act enables them to sell, by executing a deed poll; and by a similar deed they can vest in themselves the interest of a vendor who refuses to accept the purchase-money when tendered, or who fails or neglects to make out a good title, or refuses to convey, and also of a vendor who is absent from the kingdom, and cannot be found after diligent inquiry. When the conveyance is made to the promoters it will operate to bar all estates tail, and all other estates, rights,

How the estate can be vested in the promoters.

titles, remainders, limitations, trusts, and interests whatever in the land. The promoters are to bear the whole costs of the purchase, both their own and the vendor's. The concurrence of incumbrancers who refuse to receive their money or to release, or who cannot make a satisfactory title, can be dispensed with. The promoters can only exercise these compulsory powers for the period named in their special act; if that prescribes no period, then only for three years from the passing of their special act.

Provision as to surplus lands.

Further provision is also made for the disposal of lands which the promoters have bought and find are not required for the purposes of their undertaking. Within ten years after the time specified in their special act for the completion of the works for which they have bought the lands, they are to sell these superfluous lands. Unless they are situate in a town, or are lands built upon or used for building purposes, they must be first offered to the person entitled to the lands, if any, from which they were originally severed; if he declines to buy, or does not within six weeks signify his wish to purchase them, or cannot be found, then they are to be offered to other adjoining owners. If they will not buy, the property may be sold to other persons; but if not sold by the expiration of the ten years, then the lands will become the property of the owners of property adjoining thereto, in proportion to the extent of their lands respectively adjoining the same.

On a sale of such surplus lands restrictions may be imposed on the purchasers (*In re Higgin's Contracts*); but it is not possible for the vendor company to reserve to themselves the right of repurchase at a future time, since the conveyance must be absolute, without any reservation of interest to the company. (*L. & S. W. Rail. Co.* v. *Gomm;* and see *Bray* v. *Walker*, and *In re Thackeray's Contracts.*)

The property is deemed to be converted on the fixing of the price.

Directly the price payable to the vendor for lands compulsorily taken is fixed, but not before, the property is converted, so that if the vendor dies before completion the purchase-money forms part of his personal estate. (*Haynes* v. *Haynes.*) This conversion does not, however, take place if the lands belonged to a person under disability, or if the lands are settled; in such cases, as already mentioned, the money is paid into the bank, and has to be laid out in certain specified ways referred to.

The application of the Trustee Act, 1893.

In connection with persons whom such disability prevents from conveying under the Lands Clauses Act, the provisions of the Trustee Act, 1893 (Part III.), formerly the Trustee Act, 1850, will be found useful. This act makes provisions for the vesting of estates in the hands of trustees and mortgagees who are under disability. In such cases the estates can be passed by applying to the court and obtaining a vesting order. In the case of a lunatic trustee or mortgagee, the Lord Chancellor can make a vesting order which will vest the estate in such person (generally a new trustee; see *Re Holland*), and for such estate as he shall direct, and will have the effect of a conveyance; and the Lord Chancellor may also make an order releasing the lands of such a trustee or mortgagee from his contingent right therein, and disposing of it to such person as he shall direct. And in the case of infant trustees or mortgagees, similar orders may be made by the Chancery Division. Such an order may also be made by the court when a sole trustee is out of the jurisdiction or cannot be found; and where a joint trustee is out of the jurisdiction or cannot be found, the court may make an order disposing of his contingent right in the land to the persons jointly entitled with him, or to them together with any other persons. Similar orders can be made when it is uncertain which of several trustees was the survivor, or where it is uncertain whether the last trustee is living or dead. It is well also to remember that under sect. 30 of the Conveyancing Act, 1881, when a sole trustee or mortgagee dies, the person to convey or re-convey is his personal representative, and not his heir nor the devisee of his trust or mortgage estates, unless they be of copyhold tenure. (Copyhold Act, 1887, s. 45.)

The application of the Conveyancing Act, 1881.

IX. Limited Owners of Land.

Powers of sale by limited owners to sell are statutory.

Persons not having the whole fee simple in the land are empowered under various circumstances by statute law to dispose of the whole fee. Thus, leaseholders have, in certain cases, power to convert their tenancy into a fee simple or freehold under the provisions of the Conveyancing Acts, 1881 and 1882; tenants for life can sell the fee simple estate in their land under the Settled Estates Act, 1877, with the leave of the court; and,

under the Settled Land Act, 1882, tenants for life (which term includes tenants in tail, tenants in fee with an executory limitation over, persons entitled to base fees, tenants for years determinable on life, not holding merely under a lease at a rent, tenants *pur autre vie*, tenants in tail after possibility of issue extinct, tenants by the curtesy, &c.; see sect. 58) may, on observing certain formalities, sell the settled land without such leave.

The provisions of these acts will be found treated at length under the head of Settlements. (*Post*, Part V., Ch. III.)

Sales may also be made by limited owners under powers given them by settlement and wills. In these cases the terms of the power must be strictly complied with.

CHAPTER II.

THE PARTICULARS OF SALE.

Examination of deeds with view to sale.

HAVING ascertained that the vendor is under no personal incapacity to sell, you may take it for granted for the moment that no further incapacity is imposed on him by the nature of his estate and interest in his property. The proper course is to examine the muniments of title and satisfy yourself that he has free powers of disposal, and also clearly to understand what he has to sell. But we will presume that he is unhampered in any way, and can make a good title. If the sale is to be carried out by public auction, you will have to prepare the advertisement of the property, and the particulars and the conditions of sale. The preparation of the particulars of sale, indeed, is in many places left to the auctioneer who is selected to carry out the sale; but even if you do not actually draft them, it is your duty to revise them before they are issued, to see that they in no way offend against the law.

The preparation of particulars of sale.

The object of the particulars is to describe what you propose to sell. It is the function of the Conditions to state the terms on which the property is to be sold. While naturally wishing to describe the estate to its best advantage and attract purchasers, you must not, in drawing the particulars, neglect the point, to what extent does the law interfere with your proposed description?

The points to be observed in drawing up particulars: (a) Matters of opinion;

There are two main things to be observed—the one is, not to say too much; the other, not to say too little. As to the first point, it only applies to matters of fact, for in matters of mere opinion you may practically say what you like. Thus you may puff the property to any extent. As long as you confine yourself to generalities you can be as grandiloquent as you please in

praising it. Thus, for instance, you may describe land which is a "water-meadow," but very poorly watered, as an "uncommonly rich water-meadow," and the purchaser will not be entitled to rescind the contract, or even so much as to claim compensation on discovering the truth; for opinions may differ as to whether land is poorly or richly watered (see *Scott* v. *Hanson*); but this would be going to the extreme limit allowed. You may state that the property is worth any sum you like (see *Re Hurlbatt and Chaytor*); you may even say, although it be not the fact, that such-and-such a sum has been offered for the property, and by this device try to induce the purchaser to give a higher price than the land is worth. But you must take care not to make a misstatement of a fact, as was done in *Roots* v. *Snelling*. Here the defendant contracted to buy land from the plaintiff for 20,000*l*. At the time of the sale the purchaser alleged that he asked the vendor if the property were the same as that which had been offered to him by an agent of the vendor for 12,000*l*, and the vendor said it was not. The court held the contract was not binding, as the vendor's statement was not merely the expression of an opinion as to value, but affected the subject-matter of the contract, and the purchaser had relied on the statement. And see *Redgrave* v. *Hurd*, the facts in which illustrate the same principle, that you must not make a statement to put the purchaser off his guard and induce him not to make some inquiry he would otherwise have made, and which inquiry would probably have prevented him becoming a purchaser.

(b) Matters of fact.

The sum of the matter is this:—You say what you like in the endeavour to make a good bargain for your client, but, beyond the commendations and rhodomontade of a person trying to obtain the best price for his wares you must not go. There must not be the slightest suspicion of a desire on your part to "take the purchaser in;" and if you make any statement which is not quite strictly true, it must be one of such a nature that the court would consider it not likely to be believed by the purchaser, but which would be recognized by him as the mere exaggerated language of one who naturally wishes to say as much in recommendation of the property he has for sale as he can. But you must take the greatest care that any positive statements you make which tend to enhance the value of the

Summary.

property, and which a purchaser would be likely in the ordinary course of things to rely on, are strictly true. It will be no defence to say that you had no intention of taking the purchaser in, or that you were not aware that your representation was not correct; it is your duty to ascertain that every positive statement of fact you make is absolutely true.

What will amount to misrepresentation:

There have been many and conflicting cases on the subject of what amounts to a misrepresentation, and further, what constitutes such a misrepresentation as will entitle the purchaser to rescind the contract altogether, and what will merely entitle him to receive compensation for the misdescription, while he is compelled to carry out the contract in spite of it.

(1) To entitle the purchaser to rescind;
(a) On the ground of *suggestio falsi*;

Let us consider, firstly, some cases in which the misrepresentation has been held to be sufficient to enable the purchaser to rescind the contract. The most frequent description of this kind of misrepresentation is that which is considered as amounting to fraud in that it comes within the description of a "*suggestio falsi*," or positive statement of a fact as true which really is not true.

With regard to this, it is laid down as follows:—

When a party intentionally or by design misrepresents a material fact, or produces a false impression in order to mislead another, or to entrap or cheat him, or to obtain an undue advantage over him, in every such case there is a positive fraud in the truest sense of the term. (*Hill* v. *Lane*.) And not only does fraud exist where the statements are known to be false by those who make them, but also where statements false in fact are made by persons who do not know them to be true or false, or who believe them to be true, if in the due discharge of their duty they ought to have known, or if they had formerly known and ought to have remembered the fact which negatives the representation made.

Moreover, a misrepresentation, in order to justify the rescission of a contract, must be as to some material fact constituting an inducement or motive to the act or omission of the other party. It must be a *fraus dans locum contractui*, *i.e.*, "the assertion of a fact on which the person entering into the contract relied, and in the absence of which it is reasonable to infer that he would not have entered into the contract; or the sup-

pression of a fact, the knowledge of which it is reasonable to infer would have made him abstain from the contract altogether." (*Pulsford* v. *Richards*.) For a good illustration, see *Brewer* v. *Brown*. There the particulars described the property as "inclosed by a rustic wall, with tradesman's side entrance." The wall did not form part of the property, and the entrance was used on sufferance. In spite of a condition that errors should not annul the sale, but be the subject of compensation, it was held that it was not a case for compensation, and the contract was rescinded. Again, it is a material misdescription to describe an underlease as a lease (unless, possibly, where the vendor selling the underlease is a mortgagee, and the mortgagor has agreed to hold the remaining days of the term as trustee for him); and a clause in the conditions that the description of the property is believed to be correct, and that errors shall not annul the sale nor be a ground of compensation, will not cure it, such a condition only applying to errors in the physical characteristics of the property (*Re Beyfus to Masters*); though, on the other hand, if A. contracts to buy from B. B.'s "interest in a lease," A. cannot refuse to complete on the ground that it turns out that B. has only an underlease (*Waring* v. *Scotland*); and it is not a misdescription to describe land as freehold when it is in fact of burgage tenure, as these are practically freeholds. (*Wadmore* v. *Toller*.)

The misrepresentation must also be something in regard to which the one party places a known trust or confidence in the other, so that puffing is allowable. The maxim is, "*Simplex commendatio non obligat*." In mere matters of opinion, where both parties are at liberty to make all examinations and inquiries they like, it is presumed that neither party trusts the other, but relies on his own judgment. (See *Re Hurlbatt and Chaytor*.)

Lastly, to obtain relief on the ground of misrepresentation, the party must have been misled by the representation. If he knows it to be false, it should not influence his conduct, and he has only his own indiscretion to blame. Further, he must be misled to his prejudice or injury. Moral obligations and unconscientious acts, followed by no loss or injury, do not come within the scope of the remedial jurisdiction of the courts.

(b) On the ground of *suppressio veri*.

Another kind of misrepresentation is that which consists in a "*suppressio veri*" to the injury of another; that is, the concealment or suppression of such facts as the one party is bound in conscience to reveal to the other, and which the other party has a legal, as distinguished from a mere moral, right to know (see *Fox* v. *Macreth*)—*e.g.*, if a vendor sells an estate knowing that he has no title to it, or that there are incumbrances on it of which the purchaser is ignorant, and he suppresses the fact, this will make the sale liable to be avoided on the ground of fraud. For the very purchase implies a confidence on the part of the purchaser that no such defect exists. It should be remembered, however, that the maxim in most cases is "*Qui tacet non videtur affirmare*," and the rule of "*caveat emptor*" applies.

Mr. Prideaux's summary as to misrepresentation.

Mr. Prideaux, in his excellent dissertations on the subject, summed up the result of the various cases as follows:—

"A purchaser is entitled to rescind the contract—

"(1) If the misstatement on the part of the vendor is wilful:

"(2) If the effect of making the purchaser complete would be to put upon him something constitutionally different from that for which he contracted:

"(3) If the misdescription is such that it may be reasonably supposed that but for such misdescription he would not have entered into the contract at all:

"(4) If the misdescription is of a nature not susceptible of compensation."

(2) To entitle the purchaser to claim compensation only.

Secondly, we have to consider what misdescriptions will entitle a purchaser not to refuse to complete altogether, but if compelled to complete his contract to insist on completion with compensation. These are cases where the purchaser does not get the identical thing he bargained for, but substantially gets it. The most usual class of cases of this kind are those where there has been some misdescription of the quantity or acreage of the land, and in which the amount thereof as stated does not grossly differ from the amount as it actually exists. Shortly, the result of a misrepresentation which, while it does not come within any of the four above-mentioned heads, and so does not entitle the purchaser to rescind altogether, nevertheless puts on him something

less valuable than he bargained for, will be that he must carry out the contract, but may deduct from the stipulated purchase-money such a sum as will compensate him for the loss in value. It would seem that the purchaser waives his *implied* right to compensation by taking a conveyance without demanding it. (*Newcham* v. *May;* and see dicta in *Jolliffe* v. *Baker.*) At least this is so if the misdescription is in a point as to which the purchaser could have discovered the truth before conveyance. (*Clayson* v. *Leech.*) But where there is an express stipulation for compensation, and an error is not discovered till after completion, compensation may nevertheless be still recovered, for the conveyance does not operate to merge the condition as to misdescription. (*Palmer* v. *Johnson; Re Turner and Skelton.*) And to meet such a case and prevent the purchaser asking compensation for an error discovered after completion, the conditions of sale sometimes provide that compensation shall only be allowed for errors discovered before completion.

Conclusion.

In fine, if you make any statement of fact in the description take care to state it accurately; and, on the other hand, if you abstain from mentioning any fact which materially diminishes the value of the property, take care that it is one which the purchaser could have discovered by himself on using ordinary diligence, or one which you are not bound *in foro judicis* to disclose. Of course, any actual attempt to conceal a defect will enable the purchaser to get off his bargain.

When the vendor misrepresents the quantity of the land, and the purchaser elects to take what the vendor has to sell, with a compensation for the quantity it falls short of, the compensation is estimated on the basis of what the property would have fetched had the real facts been known to the purchaser; and the difference between this amount and the amount he contracted to give under the misrepresentation is the amount of the compensation. (*Re Aspinall and Powell.*)

The rules that apply to the particulars apply also to sketches and plans of the estate. If through inaccuracy they mislead a purchaser, he will be entitled to refuse to complete, even if he might have discovered and corrected the inaccuracy on consulting some document.

CHAPTER III.

THE CONDITIONS OF SALE.

The two main objects of conditions of sale: (1) To save expense; (2) Not to damp the sale.

THE object of the conditions of sale is to describe the terms on which the estate is to be sold. In framing them two great objects are to be kept prominently in view—(1) To save your client from unnecessary expense, and throw the costs of investigations, which would fall on him if not otherwise provided, upon the purchaser; (2) not to make the conditions so stringent as to "damp the sale," and cause purchasers to offer a less price than they otherwise would.

An open contract.

One of the main objects, then, of the conditions is to throw on the purchaser burdens which, in the absence of stipulation, that is, when there is an "open contract," would fall on the vendor.

The obligations it places on the vendor:

Under an open contract there is implied an agreement that the property is the vendor's to sell, and that he will make a good title to it free from incumbrances. This agreement lays him under the following obligations:—

(a) As to length of title;

He would have to show a title for a period of forty (formerly sixty) years prior to the day of sale. (Vendor and Purchaser Act, 1874.) This act does not apply to advowsons, so that on the sale of an advowson he would be bound by the old law, and be under the necessity of showing a title for 100 years, or for sixty years with three presentations. (See 3 & 4 Will. 4, c. 27, s. 30.) And it is not clear, owing to the definition of the word "land" in the statute, whether the statute applies in the sale of incorporeal hereditaments; and if it does not, a purchaser of such property can still call for a sixty years' title.

(b) As to abstract and production of documents;

The abstract of title would have to show the title for forty years back, and he would have at his own expense to produce all deeds, documents, &c. referred to in it. This, however, is

subject to sect. 2, sub-s. 2, of the Vendor and Purchaser Act, 1874, in contracts made since 1874, under which recitals, statements, descriptions of facts, matters, and parties contained in deeds, &c., twenty years old at the date of the contract, are, unless proved inaccurate, to be taken as sufficient evidence of the truth of such facts, &c. And it is also subject (in contracts made after 1881) to sect. 3, sub-s. 3, of the Conveyancing Act, 1881, which provides that the purchaser is to assume, unless the contrary appears, that the recital in an abstracted instrument of any deed, will, or other document forming part of the *prior title* is correct, contains all the material contents of such document, and such document was duly executed and completed. The same sub-section further precludes a purchaser from requiring the production or any abstract or copy of any instrument dated before the time fixed by law, or by the contract when there is one, as the time for the commencement of the title, and from making any requisition or objection in respect of such prior title; and even where the prior title shows the creation of a power which is exercised by a deed appearing in the abstract, the purchaser is prevented from calling for the instrument creating the power. Further, in contracts made after 1881, the Conveyancing Act throws on the purchaser the expense of the production of certain kinds of documents of a semi-public nature, such as acts of parliament, records, court-rolls, &c., and also of deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of journeys incidental to the production and inspection of them, and also the expenses of making copies of any documents which the vendor is entitled to retain. But the vendor must still, under an open contract, pay the expenses attending the production of a deed not in his possession, for the purpose of drafting his abstract of title, if the document is one which forms a link in his chain of title, and is not a mere deed about which the purchaser is entitled to require information. (*Re Johnson and Tustin.*) Thus, the expenses of the production of deeds in the possession of mortgagees from the vendor fall on the purchaser under sect. 3, sub-s. 3, of the act, excepting expenses incurred for the purpose of enabling the vendor to prepare his abstract. (*Re Willett and Argenti.*)

Recitals, twenty years old prove themselves.

Recitals of prior title correct and sufficient.

Prior title cannot be called for, inquired into, or objected to.

Production of documents not in vendor's possession.

Expense of, for verification, falls on purchaser;

for making out abstract, on vendor.

(c) As to an outstanding estate;

He would have to bear the expense of getting in any outstanding legal estate, and this is still the case, for no provisions on the point have been made by the recent statutes.

(d) As to registration;

He would have to make good the want of registration of any deed requiring registration.

(e) As to reversionary titles on sale or grant of lease;

Prior to 1875, under a contract to grant or assign a lease, he would have had to have shown the title to the reversion, and this whether the interest, out of which the lease he proposes to create or assign was carved, was freehold or leasehold; and he would have had to have shown that its owner had power to create the lease the subject of the contract. He was relieved from this necessity, when the reversion was freehold, by the Vendor and Purchaser Act, 1874, s. 2, sub-s. 1, but not when the reversion was a leasehold one. In *assigning* a lease since 1881, the assignor need not now show the reversionary title, even though it be a leasehold one. (Conveyancing Act, 1881, s. 3, sub-s. 1, and see *Gossling* v. *Woolf*.) But on a contract to *grant* an underlease, the lease out of which the underlease is carved will still have to be shown; but on the grant of a sub-sub-lease the title to the leasehold reversion need not be shown, *i.e.*, the original lease cannot be called for. (Conveyancing Act, 1881, s. 13.) Thus, A. has leasehold property: he grants a sub-lease to B.: B. contracts to grant an underlease to C. Here, under sect. 13, C. could not call on B. to show A.'s power to grant the sub-lease to B. This somewhat involved subject we have attempted more fully to explain on a subsequent page. (See *post*, pp. 105, 106.)

(f) As to enfranchised copyholds;

In the special case of the sale of enfranchised copyholds, the vendor had formerly to show, not only the title of the copyholder, but also the freehold title of the lord of the manor down to the time of the enfranchisement, unless the enfranchisement had been effected under the Copyhold Act, 1852, when it was unnecessary to show the lord's title. (*Kerr* v. *Pawson*.) But now, by virtue of the Conveyancing Act, 1881, s. 3, sub-s. 2, a purchaser of enfranchised copyholds, whether the enfranchisement took place under the Act of 1852 or not, cannot call for the title "to make the enfranchisement," *i.e.*, he cannot call for the lord's title, and possibly he may have to be satisfied with the enfranchisement deed, however recently made, as the root

of title. This provision applies to all contracts made since 1881.

Again, if his title commenced with a will, he would be put to the expense of having to prove that the testator was seised in possession of the land at the date of his death, no matter how many years ago the testator died. (g) As to seisin;

He would also have to show the identity of the land sold with that described in the deeds as abstracted. (h) As to identity;

Before 1875, where the deeds were not handed over, no purchaser would be compelled to complete without obtaining a legal covenant for their production, and this although he would have an equitable right to their production. (*Barclay* v. *Raine*.) Since that date, however, by the Vendor and Purchaser Act, 1874, s. 2, sub-s. 3, the vendor's inability to furnish such a covenant will not in such a case be an objection to the title, in case the purchaser will have an equitable right to such production. But in other cases, where the purchaser does not obtain the deeds on completion, the vendor must give him, if he himself retains the deeds, an acknowledgment of his right for production and an undertaking for safe custody (sect. 9 of the Conveyancing Act, 1881), or procure from the person having the custody a covenant to produce and keep safe the deeds. (*Re Purssell and Deakin's Contracts*.) (i) As to procuring a covenant to produce;

Formerly, notwithstanding the Vendor and Purchaser Act, the purchaser of leaseholds could, on grounds discovered elsewhere than from the abstract, raise objections to the lessor's power to grant the lease. But now, by the Conveyancing Act, 1881, s. 3, a purchaser cannot inquire into the circumstances attending the grant of the lease, unless it appear on the face of it, or otherwise, that it was not duly granted. And further, on the production of the last receipt for the payment of rent due before completion, he is bound to assume that all the covenants and provisions of the lease have been duly performed up to the date of completion. A similar provision is made with regard to the sale of an underlease, which requires the purchaser to assume that the superior lease as well as the underlease was duly granted, and, on production of the last receipt for rent, that the covenants of both have been duly performed up to the date of the completion of the contract. (See *post*, p. 53). (j) As to lease being duly granted.

(k) As to deeds executed under powers;

Again, if any deed appeared to have been executed by an attorney, he would have to prove to the satisfaction of the purchaser that the donor of the power was alive at the date of the execution of the deed, and further, that the power had not been revoked. Sects. 8 and 9 of the Conveyancing Act, 1882, however, now provide that powers of attorney can, in certain cases, be made irrevocable, and sect. 47 of the Conveyancing Act protects persons who act under a power of attorney not so expressed to be irrevocable at a time when it had been revoked, but of which revocation the persons so acting had no notice; and see sect. 23 of the Trustee Act, 1893.

(l) Miscellaneous inconveniences of open contract.

Other inconveniences attending open contracts are, that in an open contract there will be no time fixed for the delivery of the abstract, and for sending in the requisitions on title, and no date specified for the completion of the sale; there will be no arrangement as to taking of possession, as to interest on the purchase-money, or as to the rescission of the contract or compensation in case the vendor is unable to furnish a clear and comprehensive title: the purchaser, too, will run a great risk of entirely losing his anticipated bargain; for should the property consist of a house, and that house be destroyed by fire before completion, he would not be entitled to any insurance money there might be, but would have the chagrin of seeing the vendor pocket it and the purchase-money as well. (See *Rayner* v. *Preston*.) And though in such a case the insurance company could recover for their own benefit the insurance money from the vendor (see *Castellain* v. *Preston*), this would be little consolation to the purchaser. (See more fully hereon, *post*, pp. 66, 67.)

Rule for guidance in drawing conditions.

Now that you understand what obligations are cast on a vendor who sells under an open contract, you will be able more clearly to grasp the nature of the stipulations which you should insert in the conditions of sale, or in a contract, in order to protect him. Before preparing the conditions of sale, then, you will carefully go through the title-deeds, and whenever you find that there are points in the title which the purchaser has the right to have cleared up before completing, you must ask yourself, On whom is the expense of clearing them up cast by law? If upon the purchaser, then you need say nothing about them in the conditions; but if they will fall on the vendor, then you must

ask yourself, Shall I, by stipulating that the purchaser shall bear these expenses, do anything which is likely to damp the sale? If the reply to this is, No, then you should insert the stipulation; if the reply is, A purchaser might be deterred from giving a good price by such a condition, then you must use your discretion to decide whether it is not better that the vendor should take on his own shoulders an expense which may be fully balanced by the enhanced price he may get, owing to the absence of strict and deterrent conditions of sale.

The main object of conditions to save expense.

These, then, are the obligations which will fall on your client if a vendor under an open contract; to relieve him wholly or partially from the burden of these obligations, and to obviate the miscellaneous inconveniences we have referred to above, your attention should be mainly directed; in short, here you have the first main object of conditions of sale—to save your client expense. When you are acting for a vendor who is a trustee, you must be particularly careful in framing the conditions. It is a trustee's duty to get the best price he can for his *cestui que trusts*, and to do nothing which would depreciate the selling value of the estate; and if he enters into any stipulations not absolutely required by the state of the title, the *cestui que trusts* can make him liable in damages for any loss in price thereby caused; and formerly, in such a case, the *cestui que trusts* could set aside the sale, and this even though the trustee were authorized (as he is now in all cases (see the Trustee Act, 1893, s. 13)) to sell subject to any conditions he may think fit. (*Dance* v. *Goldingham;* and see *Re Cooper and Allen.*) But by sect. 14 of the same statute, namely, the Trustee Act, 1893, it is provided that no *cestui que trust* shall impeach a sale made by his trustee on the ground that the conditions of sale were unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate; and no sale made by a trustee can, after the execution of the conveyance, be impeached on the ground that the conditions were depreciatory, unless it also appears that the purchaser was acting in collusion with the trustee at the time of the contract for sale. ~~While~~ the fact that a trustee has sold subject to some unnecessarily stringent conditions which may give the *cestui que trust* these rights, yet it does not now, as it formerly did, give the purchaser any right

Conditions on sales by trustees.

Notwithstanding

to resist specific performance. (See Trustee Act, 1893, s. 14, overruling *Dunn* v. *Flood* and *Dance* v. *Goldingham*.)

Classification of conditions of sale.

In considering conditions of sale, we shall adopt the following classification of them:—

I. Conditions relating to the auction.

II. Conditions relating to the abstract, the requisitions, the completion, and fixing the times for the same.

III. Conditions relating to the property sold and its identity, &c.

IV. Conditions relating to compensation for errors, and resale on default to comply with conditions.

V. Some special conditions to meet special cases.

I. Conditions relating to the Auction.

Usual conditions.

These conditions generally provide that the highest bidder shall be the purchaser; that in the event of disputes as to bids, the property shall be put up again; that no one shall advance less than £ at each bid; that no bidding shall be retracted; that the purchaser shall pay a deposit, and sign an agreement to complete the purchase according to the conditions.

As to retracting biddings.

The stipulation as to retracting biddings will probably not bind the purchaser. The purchaser's bid is an offer, and until the fall of the auctioneer's hammer there is no acceptance of it on the part of the vendor, and an offer may be withdrawn at any time before it is accepted. The condition, however, can do no harm.

As to the vendor's right to bid.

As to reserving to the vendor a right to bid, the Sale of Land by Auction Act, 1867 (30 & 31 Vict. c. 48), provides that on a sale by auction the conditions shall state whether the sale is without reserve or whether the right to bid is reserved, and that if it is stated that the sale is without reserve, the seller may not employ anyone to bid for him, and the auctioneer may not knowingly take a bid from any such person. The act further provides that where the conditions state that the sale is subject to a right for the seller to bid, the seller or any one person on his behalf may bid at the auction in such manner as he thinks proper. The act does not say that unless the conditions state that a right

to bid is reserved, the seller shall not bid, and it seems never to have been decided what would be the effect of silence on the point. The best conveyancers are of opinion that in such a case it would be the same thing as stating that the sale was without reserve, so that the sale would be avoided if anyone were employed to bid on behalf of the vendor. (See *Thornett* v. *Haines*.)

Stipulation as to deposit.

In connection with the deposit, it is generally stipulated that it shall be paid to the auctioneer. When this is done the auctioneer holds it as a stakeholder, and may not pay it over to either party without the consent of both. And this is so even though he signs the conditions of sale as the vendor's agent. (*Furtado* v. *Lumley*.) But should it be paid to you as the vendor's solicitor, the law does not imply that you receive it as stakeholder, but you would hold it as agent for the vendor, and would have to pay it over to him on demand, and the purchaser has no claim against you in respect of the deposit. (*Edgell* v. *Day*; *Ellis* v. *Goulton*).

Object of requiring a deposit.

The object of requiring a deposit is not only to secure a part payment of the purchase-money, but to bind the purchaser to complete. Accordingly, should he unwarrantably refuse to complete, he will generally forfeit the deposit, even in the absence of express stipulation to that effect. (See *Howe* v. *Smith*; *Soaper* v. *Arnold*.) But, as we shall see, it is usual and advisable expressly to state that he shall forfeit it if he fails to comply with the conditions. However, he is not at liberty to elect to forfeit his deposit and refuse to complete; as the vendor can always force him specifically to perform the contract. If the purchaser is unable to provide the purchase-money at the date fixed for completion, and rescinds the contract, and allows his deposit, therefore, to be forfeited, he cannot recover the deposit on its subsequently turning out that the vendor had no title to the land contracted to be sold. (*Soaper* v. *Arnold*.)

Return of deposit.

If the sale goes off owing to your client not being able to make a good title, the deposit will have to be returned to the purchaser. But a vendor can plead to an action for return of the deposit (on the ground that the title is bad), that as he himself was a purchaser without notice he has what is called

a good "holding" title; but he must raise this defence before the purchaser has rescinded the contract of sale. (*Saxby* v. *Thomas.*)

When interest on deposit payable.

In the absence of stipulation, when a deposit is returnable, interest upon it must also be paid; so that, acting for the vendor, you should always preclude the right to interest. The purchaser is further entitled to recover the expenses he has been put to in investigating the title, so that you should also provide against this.

Signature of contract.

As to signing a contract, it is hardly necessary for us to remind you of the 4th section of the Statute of Frauds, which requires a contract relating to the sale of land, in order to be actionable, to be in writing, signed by the party to be charged or his agent lawfully authorized. But we may remark that the auctioneer is an agent within the statute, and his signature of the highest bidder's name in his book will be binding on such bidder; and his authority to sign for the purchaser cannot be revoked after the fall of the hammer. A solicitor acting for vendor or purchaser is not an agent with authority to sign so as to bind his client, unless expressly authorized in that behalf. (*Smith* v. *Webster.*) The agent's authority need not be in writing. It is always advisable to have the purchaser's own signature. In order to secure that a proper description of the vendor and purchaser should appear, to satisfy the statute, care must be taken to describe them sufficiently in the contract. It is not absolutely necessary to have their names and addresses, &c., as any description which will identify them will be enough. It has been held that a description of the vendor as "the proprietor" or "trustee for sale" will satisfy the statute. (See *Sale* v. *Lambert* and *Catling* v. *King.*)

Parties must be described.

Property must be described.

Consideration must appear.

The property to be sold should also be described; but in this case, too, it will be sufficiently described if it is capable of being identified by the description. (*Shadlow* v. *Cotterell.*) The consideration or price must also appear. (*Wain* v. *Warlters.*)

II. Conditions relating to the Abstract, &c.

Usual conditions.

Analyzing the usual conditions on this head, we shall find they include the following elements:—

(a) Requisitions on title to be sent in so many days after the delivery of the abstract, or they will be deemed waived.

(b) If the purchaser insists on any requisition which the vendor is unable to comply with, he may rescind the sale, and return the deposit without any interest or costs. Purchaser, however, to be at liberty to withdraw any such requisition within a specified time after receiving notice of rescission, in which case the notice to rescind will be deemed withdrawn also.

(c) Remainder of purchase-money to be paid on such-and-such a day, and matters completed at the vendor's solicitor's office. If from any cause the purchase be not completed on that day, purchaser to pay interest on the balance of the purchase-money.

(d) Purchaser entitled to possession from such-and-such a day, all outgoings up to that day to be cleared by the vendor, and rents, &c. to be apportioned.

(e) Abstract to be delivered on such-and-such a day, and to commence with such-and-such a document.

(f) As to place of production of title deeds.

(a) *As to Requisitions.*

What amounts to delivery of the abstract.

The words "delivery of the abstract," mean the delivery of a *perfect* abstract; that is to say, an abstract which sets out fully every document which forms part of the vendor's title, and states every material fact, must be furnished to the purchaser, or else it will not amount to "delivery of an abstract" at all, for the purpose of estimating the time within which the requisitions are to be sent in. (See *Blacklow* v. *Laws*.) For instance, the abstract will be imperfect if it shows that there are incumbrancers whose consent is necessary, but whose concurrence the vendor is not entitled to require; or where the vendor is a trustee for sale, but the time for sale has not arrived. (*Want* v.

Stallibrass.) But the abstract is not imperfect, even if it shows that there are outstanding interests, if the vendor can require them to be got in (*Avarne* v. *Brown*), or although the vendor has not, at the date of the delivery of the abstract, got the fee simple of the estate, provided he can acquire it, *e. g.*, by executing a disentailing assurance. (See *Sidebottom* v. *Barrington.*) If you do not deliver a perfect abstract within the time stipulated in the conditions, the purchaser will not be bound to send in his requisitions within the time named. (*Upperton* v. *Nickolson.*) It is sometimes the practice to guard against this by stipulating that the time shall be computed from the delivery of the abstract, whether the abstract is perfect or not; but such a condition is not to be recommended, as it may deter an astute purchaser, and have the effect of damping the sale.

In *Compton* v. *Bayley* no time was fixed for the delivery of the abstract, and it was held that the purchaser could give a reasonable notice (*e.g.*, as in that case, fourteen days' notice) to the vendor to deliver it, and if he failed to do so the purchaser could rescind and obtain a return of his deposit and the payment of his expenses.

Time for requisitions.

As to the condition that requisitions and objections not made within a specified time shall be taken to be waived, it is usual to state that the time limited "shall be of the essence of the contract"; for time is of the essence of the contract only where made so by express stipulation, or by necessary implication; unless, though not originally of the essence of the contract, it is made so by one party giving the other a notice to do the stipulated act within a given reasonable time. (See *Crawford* v. *Toogood; Green* v. *Sevin.*) In practice it is usual for the purchaser's solicitor, on receipt of the abstract, to indorse it with the date of delivery as a memorandum as to delivery of requisitions.

Even in the face of such a condition, the omission to send in requisitions or objections within the stipulated time will not amount to a waiver of an objection which goes to the root of the title, for the condition does not apply to the case of the vendor being unable to give a good title, but only to objections which might have been properly enforced against a vendor who had a valid title. Nor would there be a waiver (*Want* v. *Stalli-*

brass) of objections based upon information obtained from other sources than the abstract. (*Brown* v. *Stenson.*)

(b) *As to Rescission of Contract.*

The condition does not give vendor absolute right to get out of contract.

The condition as to rescinding the contract on inability or unwillingness to answer a requisition or comply with an objection, will not enable a vendor with impunity to get out of his contract any more than the forfeiture of the deposit will empower the purchaser to refuse to complete. He is *primâ facie* bound to do his best to make out a good title, and do all he can to satisfy the purchaser's objections; and having done his best, he must leave matters for the purchaser to say whether he will accept such title as he can give him. (*Turpin* v. *Chambers;* and see *Re Monkton and Gilzean.*) This condition is of no advantage to the vendor, except in the case of the purchaser insisting on some unwarrantable requisition or objection, or one which would put the vendor to some great and unjust expense. (*Hardman* v. *Child;* see *Re Dames and Wood.*) It will not, for instance, enable him to rescind the contract, and so escape an action for damages in a case where he has no title at all, or a defective title. (*Bowman* v. *Hyland; Nelthorpe* v. *Holgate.*) Nor will it enable him to rescind and so avoid the expense of obtaining the concurrence of some incumbrancer whose concurrence is necessary to make a clear title. (*Greaves* v. *Wilson;* and see *Re Jackson and Oakshott.*) But though he cannot act capriciously in rescinding the contract, it is sufficient if he has a reason for rescinding, and he is not bound to submit to the purchaser the reasons of his unwillingness to answer a requisition, at least in a case where the condition provides that if the purchaser "makes," as distinct from "insists upon," any requisition, &c., the vendor shall be at liberty to rescind. (*Re Starr-Bowkett Building Co.*)

Nor will the condition authorize the vendor to play fast and loose with the purchaser; if he means to take advantage of the condition he must do so in a decisive manner and once for all. He will lose his right to rescind if he, subsequently to notice of rescission, expresses his willingness to answer, or enters into a correspondence with a view to answering the objection. (*Tanner* v. *Smith.*) And after the vendor has given notice of rescission, the purchaser cannot withdraw the objection or

requisition which determined the vendor to rescind, and insist on the vendor completing. (*Duddell* v. *Simpson.*)

To obviate this, it is often the practice to add a proviso, that the power to rescind shall remain in force "notwithstanding any attempt to remove the objection;" or "notwithstanding that intermediate negotiations or litigation have taken place with respect to requisitions." Litigation here means "pending litigation." (*Re Arbib and Class's Contract.*)

(c) *As to Payment of Balance of Purchase-Money and Interest thereon.*

Interest on purchase-money: (i.) Where no condition;

The purchaser is bound by law to pay interest on the money remaining unpaid at the date of completion, but under an open contract he can always relieve himself from the necessity of doing so by providing himself with the money and giving the vendor notice that it is lying idle, that is, of course, where the delay is not his fault. (*Regent's Canal Co.* v. *Ware; Ballard* v. *Strutt.*)

(ii.) Where there is the usual condition.

But the usual condition provides that he shall pay this interest in case of delay to complete from any cause except the wilful neglect or default of the vendor. When such a condition is inserted, provided the delay is not caused by any default on the part of either vendor or purchaser, but is occasioned by the state of the title, the purchaser must pay interest. In *Bannerman* v. *Clark*, the delay was caused by the death of the vendor and the devolving under his will of the legal estate on an infant. Here the purchaser, although the delay arose from circumstances entirely out of his control, was held liable to pay interest under this condition. (And see *Williams* v. *Glenton.*)

Conflicting cases.

But in *Gold and Norton's Contract*, it was held, that even where there is the usual stipulation as to payment of interest, the purchaser can avoid the liability to pay the same by giving notice that his purchase-money is ready and lying idle at the bank, in a case where the failure to complete arises more from the fault of the vendor than of the purchaser, and this even though the purchaser may take the profits from the date fixed for completion. But in more recent cases (*Riley* v. *Streatfield*, *In re Tubb*, and *The Mayor, &c. of London's Contract*), the court refused to follow *Gold and Norton's Contract;* and therefore it would appear that where this condition is inserted the

purchaser cannot escape the payment of interest by giving notice that he has the money ready, unless the delay arose from the wilful default of the vendor, *e.g.*, by his going abroad for a holiday, and thus delaying completion, as in *Young and Harston's Contract*, or by his (when unable to do so) nominating an attorney to complete for him, and so causing delay, as in *Re Hetling and Merton's Contract*. Where no time is fixed for completion, interest is payable from the time when possession could prudently have been taken by the purchaser, *e.g.*, from the time when a good title is shown. (*Spencer Bell* v. *L. & S. W. Ry. Co.*)

And in *Bellamy* v. *Debenham*, where no time was fixed for completion, it was held that the vendor must show a good title within a reasonable time after the date of the contract, or he will not be able to enforce specific performance. If interest becomes payable, it will be payable at the rate of 4*l.* per cent. per annum, unless another special rate of interest be fixed.

(d) *As to Possession.*

Purchaser can take possession at time fixed for completion.

The purchaser is, in the absence of stipulation, entitled to possession and to the rents and profits of the estate from the time fixed for the completion, including whatever is payable under current leases of the property. (*Lippingham* v. *Freeman.*) And as soon as he takes possession, he will come under the liability to pay interest on the purchase-money. And if there is a stipulation that possession shall be given by a certain day, that implies a contract that possession with a good title will be given. (*Tilley* v. *Thomas.*) Should no time be fixed for completion, the vendor will be allowed a reasonable time for making out his title. (*Sanson* v. *Rhodes;* and see *Bellamy* v. *Debenham.*) Where the conditions are silent on the subject of taking possession, the purchaser should be very careful how he does so. He will not, indeed, render himself liable to pay anything for the use and occupation of the premises should the sale fall through by reason of the title turning out defective; but in some cases the taking of possession will amount to a waiver of objections to the title. This will not, however, be the case if it is taken in accordance with the intention of the parties, as evidenced by the parties' contract, or by special consent of the vendor. (See *Stephens* v. *Guppy.*)

(e) *As to Delivery of Abstract.*

Condition as to title.

In some cases it may be found necessary to restrict the length of title to be shown to twenty or thirty years; indeed, under special circumstances, vendors sometimes stipulate that the purchaser shall take such title as the vendor happens to have. Such a stipulation, though by no means to be recommended, is perfectly legal, and a purchaser buying under it cannot complain if he gets a defective title. (*Freme* v. *Wright.*) And sometimes, when the title is one which is very well known in the neighbourhood, it is the practice to stipulate that the purchaser shall not require any further evidence of title than the conveyance to the vendor.

Conditions must not attempt to hide defects in title.

If you have a defective title, you must not attempt to hide it by making the abstract commence with some instrument subsequent to the defect. If the production of a document dated anterior to the stipulated time would show, for instance, that your client, while professing to sell the fee, had only a life estate, or that the property was subject to a mortgage, the purchaser would be justified in declining to complete should he discover the fault; and even the implied provisions of the third sub-section of sect. 3 of the Conveyancing Act, 1881, that no objection should be made to the prior title, or an express stipulation to the same effect, would not preclude the purchaser from objecting should he obtain a knowledge of it. (*Smith* v. *Robinson.*) If the title is bad, your duty is to show on the conditions the nature of the defect, and provide that a purchaser shall make no objection on account thereof. Any attempts to mislead the buyer will prove futile. Thus, in *Edwards* v. *Wickwar*, the conditions provided that no objection should be made in respect of a certain underlease, which was named, or in respect "of any other underlease prior to" a certain date. It turned out that there was another underlease known to the vendor, and it was held that he ought to have disclosed it, and that the condition did not relieve him from the necessity of so doing. Again, if the conditions state as a fact that the vendor has power to sell the fee, he will not be able to frame any stipulation which will prevent the purchaser from requiring him to show that power. If there is on the title a voluntary conveyance, forming a link of the chain of title,

executed within ten years, the fact should be disclosed, as if not, the purchaser may, owing to sect. 47 of the Bankruptcy Act, 1883, refuse to complete. (See *Re Briggs and Spicer's Contracts;* but see *Re Brall;* and *Re Vansittart*, explained, *post*, p. 115; and see Part V., under Voluntary Settlements; see also *Johnson* v. *Smiley; Re Marsh and Granville; Cumming* to *Godbolt; Re Sandbach and Edmondson.*)

(f) *As to Place of Production of Title Deeds.*

Condition as to production of deeds.

In the absence of stipulation, if the deeds are in the vendor's possession they must be produced at his residence, or in the immediate neighbourhood of the estate, or at the office of his solicitor, or of the solicitor's London agent, and in that case the expenses of the purchaser, or his solicitor, of the necessary journeys to inspect the deeds, are borne by the purchaser. If you wish to produce them elsewhere, you should have a stipulation to that effect, and throw the expense of the necessary journeys on the purchaser. The purchaser must, in all cases, pay for the journeys of his solicitor to examine deeds not in the vendor's possession, under sect. 3 of the Conveyancing Act, 1881.

III. Conditions relating to the Property sold and its identity.

What passes under the term "land."

Land includes all above it *usque ad cœlum*, and all below it *usque ad inferos;* therefore, in the absence of stipulation, the sale of land will pass the trees, and generally all the erections and fixtures upon it. Therefore, if you wish the timber to be paid for separately, you should provide to that effect, and make arrangements for having it properly valued. The same remark applies to the fixtures. Again, any reservations you may wish to make should be mentioned. Thus, if you desire to reserve the mines and minerals or a right of way, or to make any exception whatever out of the grant, you must be careful clearly to express that desire.

Condition as to evidence of identity.

Another important matter relating to the property sold is the condition usually inserted limiting your legal liability to identify, to the satisfaction of a purchaser, the identity of the property you offer for sale with that described in and conveyed by the title deeds. In the absence of stipulation to the contrary, you are bound to furnish proof of this identity; and, as this is never

a very easy matter, it is generally advisable to make it a condition of the sale that the purchaser shall not require any evidence of the identity of the property as described in the particulars with the property as described in the abstracted documents other than a statutory declaration, which is to be furnished, if purchaser requires it, at his expense; such statutory declaration, when furnished, generally states that the property has been consistently held with the title shown by the abstract for a period of twenty, or more or less, years.

Two decisions on this condition.

With regard to conditions as to identity, there have been two decisions which it is worth while to bear in mind. In the first, *Flower* v. *Hartopp*, where there was a condition that no further evidence of the identity of the parcels should be required than what was afforded by the abstract, or by the deeds, &c. therein abstracted, and the descriptions in the documents differed amongst themselves and from the description in the particulars of sale, it was held that the purchaser was entitled to have some proof of the identity *aliunde*. For the deeds themselves did not here afford evidence of identity, but constituted the subject of doubt as to the identity. In the second, *Curling* v. *Austin*, where the condition was that the purchaser should not require any further proof of the identity than was furnished by the title deeds themselves, it was held that this amounted to a contract that the deeds should show identity, and that if they did not, a good title was not made out; whereas, if the deeds did show identity the purchaser could not call for any other evidence. This amounts pretty much to saying that such a condition is useless; for if the deeds do show identity the purchaser, presumably, will be satisfied and will not want any further evidence; while if they do not show identity, he can refuse to complete the contract, a good title not being made out.

IV. Conditions relating to Compensation.

Usual form of condition as to compensation.

The usual form of condition runs as follows:—

"The quantities stated in the particulars shall be presumed to be correct, and an error as to quantity, if any such shall be found, shall neither annul the sale nor entitle either party to compensation on account thereof. If any other mistake shall be found in

the particulars before the completion of the purchase, the same shall not annul the sale; but a fair compensation shall be made in respect thereof to or by the purchaser, as the case may require;" and then the condition goes on to provide for the settlement of the amount of compensation, in case of difference, by arbitrators.

Sometimes it is couched in these terms:—"The description of the property in the particulars is believed to be correct; but if any error shall be found therein the same shall not annul the sale, nor shall any compensation be allowed in respect thereof."

As to the first condition.

Referring to the first of these conditions, we have already seen that, even in the absence of any stipulation, a purchaser can be compelled to take the property with an abatement in the purchase-money when there is a slight and unintentional misdescription. (*Ante*, p. 30.) And even where there is such a condition there are cases in which, in spite of it, the purchaser will be justified in peremptorily declining to carry out his contract. The condition only applies, then, when the misdescription is too serious for a court of equity merely to order compensation, and yet not serious enough to give the purchaser the right to rescind. In these cases the purchaser will be bound by the condition, and will be forced to carry out the contract and accept compensation, when, in the absence of stipulation, he might make a successful appeal to the court to be relieved from it.

Knowledge of purchasers.

It should be noticed that when there is an error in the quantity of the parcels as described, and the purchaser knew of that error, he will not be entitled to compensation under this condition. It is, however, for the vendor to show the purchaser's knowledge.

The effect of the condition as to errors discovered after completion.

The stipulation that the condition shall only relate to errors discovered before the completion, is intended to meet the decision in *Palmer* v. *Johnson*, where it was held, the contract providing that compensation shall be made for errors, the fact that the purchaser does not discover the error till after the conveyance is executed does not prevent him from taking advantage of the condition, and that the contract is not, for this purpose at least, merged in the deed. (And see *Clayson* v. *Leach*, *ante*, p. 31.) This case would seem to overrule *Jolliffe* v. *Baker*, *Manson* v.

Thacker, and *Allen* v. *Richardson*, and restore the rule as laid down in *Re Turner and Skelton*. The case of *Perriam* v. *Perriam* must be distinguished; that decision simply established that where the error is discovered before completion, the purchaser does not necessarily waive a claim for compensation by taking a conveyance of the property under its correct description.

As to the second condition.

As to the second or substitutive clause above given, it will only extend to slight and comparatively immaterial errors in quantity. (*Whittemore* v. *Whittemore*.) The condition more particularly applies to physical errors, and not to errors which could not have been discovered by an inspection of the property; thus it would not protect a vendor who described an underlease as a lease. (*In re Masters and Beyfus*.) And generally these conditions are not so formidable as they look; for no condition will preclude a purchaser who is resisting specific performance from requiring compensation or rescinding the contract in cases where by the ordinary doctrines of equity he would be entitled to do so were there no condition, but where this condition is inserted, that is to say, where the condition deprives the purchaser of any right to claim compensation, he could not, as plaintiff, insist on specific performance with compensation, as he would be bound by the condition. (See *Cordingley* v. *Cheesborough*, and *Re White and Terry's Contracts*.)

V. Condition giving Vendor Right to Re-sell.

Vendor's rights if conditions not complied with.

The usual form of conditions provides that if the purchaser fails to comply with the conditions he shall forfeit his deposit, and the vendor may re-sell the property and recover any difference in price, such difference to be considered as liquidated damages; and further, that it shall not be necessary for him to tender a conveyance before re-selling. Even in the absence of stipulation, a purchaser who has disentitled himself to sue for damages for non-completion forfeits his deposit (*Depree* v. *Bedborough*; *Howe* v. *Smith*); and the vendor has the right to re-sell and recover any deficiency, so that the condition appears merely declaratory of the vendor's rights. It seems to be doubtful whether a tender of a conveyance is necessary before exercising the right to re-sell; so it is better clearly to state that such tender shall not be necessary. The deposit, even when paid in part

payment of the purchase-money, is considered as a security that the purchaser will complete, so that if he is guilty of such conduct as amounts to a repudiation of the contract, and the vendor re-sells, he cannot recover the deposit. (*Howe* v. *Smith*; *Soaper* v. *Arnold*.)

VI. Some Special Conditions.

Nature of property or title often requires special conditions.

The above may be said to be the conditions under which you will sell by auction in ordinary cases. But sometimes the nature of the property, and sometimes the peculiar state of the title, will render other and special conditions necessary. These can be roughly divided into—(1) conditions required by the nature of the tenure of the land, and (2) conditions rendered necessary by defects, special circumstances, &c., in the title.

1. *Special Conditions required by the nature of the Tenure of the Land.*

As to titles registered under the Land Transfer Act, 1875.

With regard to titles registered under the Land Transfer Act, 1875, an owner of land may register it with an absolute, qualified, or possessory title. It will be unnecessary to fetter the sale of lands registered with an absolute title with any conditions; but when registered with a possessory or qualified title only, as this does not guarantee the goodness of the title prior to the date of registration, or before some specified date, it will be necessary to have a stipulation that the purchaser shall not investigate the title prior to the registration, or else he will be entitled to have the usual forty years' title deduced to him. He should be required to assume that at the date of registration no estate, right or interest adverse to or in derogation of the vendor's title was subsisting or capable of arising.

As to enfranchised copyholds.

No special condition need now, in consequence of the Conveyancing Act, 1881, s. 3, sub-s. 2, be resorted to on the sale of enfranchised copyholds. (See *ante*, p. 34.)

As to inclosed lands.

As to lands inclosed, and which have been allotted by an award made under the Inclosure Act, 1845, or by any general Inclosure Act, the purchaser, in the absence of stipulation, is entitled to have shown to him the title to the original estates in respect of or in exchange for which they were allotted, as such

allotted lands become liable to the uses of the estates in respect of which they were allotted. The purchaser is also entitled to be satisfied as to the regularity and validity of the award. The vendor should provide against this by a proper condition.

As to lands exchanged.

If the property has been the subject of a common law exchange prior to 1845, the vendor will have to show the title to the lands given in exchange as well as to those taken; so that here is another case in which the purchaser's right should be curtailed by a condition. But if the exchange has been effected under the Inclosure Act of 1845, s. 147, the title to the land given in exchange is transferred to that taken, so that title will have to be shown for forty years back to the land given in exchange up to the date of the exchange, or, if the exchange took place less than forty years ago, then so much of the title to the land taken in exchange as is necessary to make up the forty years. A condition may again here be advisable to restrict the purchaser's rights.

As to lands granted by the Crown.

In case the title to the land offered for sale is derived from a grant from the Crown the purchaser's right to call for a copy of such grant should be negatived.

As to leases and underleases.

As to leases and underleases, we have seen that by the Conveyancing Act, 1881, and the Vendor and Purchaser Act, 1874, a purchaser of a lease or underlease cannot now call for the title to the reversion, be it a freehold or a leasehold one. (*Ante*, p. 34, *et post*, pp. 105, 106; and see *Gossling* v. *Woolf*.) The lease itself has, however, to be produced, with the mesne assignments for forty years previous to the date of sale (see hereon *Williams* v. *Spargo*); and as the above statutes do not seem to prevent objections being made as to the validity of the original lease on grounds appearing on the face of it, or discovered *aliunde*, you should, when you cannot produce the original lease, stipulate for its non-production and debar the purchaser from making any objection or requisition as to the lessor's or the previous title, and require him to assume that the lease was well granted. And when certain mesne assignments made during the period over which this abstract extends (see *Williams* v. *Spargo*) are not produced, he should be further required to assume that such assignments operated to vest in the vendor a good title for the residue of the term. Again, if the original lease required that a licence should be necessary previous to assigning, it will be ad-

visable on a sale by an assignee to require it to be taken for granted that such licence was duly obtained; for the acceptance of rent by the lessor (should no such licence have been obtained) would only amount to a waiver if he had notice of the assignment. Once more, if the subject of the sale is a lease which has been renewed, the purchaser's right to call for the surrendered leases ought to be negatived. It will now be unnecessary to insert any stipulations as to the assuming that the rents have been paid and the covenants and conditions of the lease have been duly performed, unless the rent be a peppercorn or nominal rent only (*Re Moody and Yates' Contract*); for the Conveyancing Act, 1881 (s. 3, sub-ss. 4, 5), provides, that on the sale of a lease and the production of the receipt for the last payment of *rent* due before completion, the purchaser is to assume that all the covenants of the lease have been duly performed up to the date of completion; and that on the sale of an underlease, on the production of a similar receipt (that is, a receipt for the last rent due under that underlease, see *Higgins and Percival's Contracts*) the purchaser is to assume that all the covenants of the superior as well as of the underlease, and the rent due under the latter, have been paid and performed up to the date of the sale. Some conveyancers, however, do not think these conditions stringent enough, and still use the old common form condition, which makes the production of the last receipt for rent *conclusive* evidence that the rent has been paid and the covenants performed.

2. *Special Conditions rendered necessary by the peculiar state of the Title or defects thereof.*

Special conditions.

These, of course, are very numerous, and must be framed to meet the peculiar circumstances of each case. We can do no more here than mention some few of those which are of more frequent occurrence. As we have already mentioned, when the title is defective the proper and safest course is to state in the conditions what the defect consists in, and then provide that the purchaser shall make no objection on account of it.

When the root of title is a devise.

If the title commences with a devise, you should provide that the purchaser is to assume that the testator was seised in fee at the date of his death, and to require no other evidence of his being so than a statutory declaration to that effect, to be fur-

nished at his expense. Otherwise the purchaser will be entitled to full evidence of seisin.

When a deed has been executed under a power.

If any deed has been executed under a power of attorney which does not come within sects. 8 or 9 of the Conveyancing Act, 1882, and so is not irrevocable, you should have a condition requiring the purchaser to assume that the donor of the power was alive at the date of the execution of the deed.

When there is no indorsed receipt on a deed.

If, in any deed dated prior to 1882, there is no receipt for the purchase-money indorsed and signed by the proper parties, you should take care to provide that no objection be made on that ground. As to deeds executed after 1881, the Conveyancing Act provides that a receipt for the consideration in the body of the deed shall be a sufficient discharge without any further receipt being indorsed, and that such a receipt or an indorsed one shall, in favour of a subsequent purchaser without notice that the consideration was not in fact paid or given, be sufficient evidence of the payment or giving thereof. (Sects. 54, 55.) But if there is no such receipt, and even though there may be a statement that in consideration of £ paid by A. to B. (see *Renner* v. *Toller*), care should be taken to insert a condition precluding the purchaser from calling for evidence that the money passed.

When the legal estate is outstanding.

Where there is a bare outstanding legal estate, *i. e.*, when the legal estate is outstanding in some trustee or mortgagee, but the active duties of the trust have ended, or the mortgage has been paid off, but no reconveyance taken, and where a fair and reasonable time has elapsed, and in subsequent dealings with the property the outstanding of the legal estate has been disregarded or treated as got in, you should provide that the legal estate shall be presumed to have been reconveyed.

When land tax or tithe certificate is lost.

If the property is stated to be free from land tax or tithe, and in the case of the land tax you cannot produce the certificate of the Commissioners showing it to be free, or in the case of tithes cannot produce evidence to show that the land is discharged from them, you should provide that no inquiry shall be made on the point. Sometimes it is stipulated that a declaration of the land-tax collector, or by some other person, that the land is free from the tax, to be furnished at the purchaser's expense, shall be accepted as conclusive evidence.

If any of the documents of title executed prior to 17th May, 1888, are found to be unstamped or not registered, it should be stipulated that the purchaser shall bear the expense of properly stamping or registering them if he thinks it necessary. But you cannot insert such a condition with reference to unstamped documents executed after that date. For, in the first place, by the Customs Act, 1888, and now by the Stamp Act, 1891, s. 117, it is provided that every condition framed with the view of precluding objections to title on the ground of absence or insufficiency of stamps on any instrument executed after the 16th May, 1888, and every contract, arrangement, or understanding for assuming the liability on account of the absence or insufficiency of stamps on any such instrument, or indemnifying against such liability, absence, or insufficiency, shall be void.

When documents are not stamped.

A voluntary deed may, as you know, become void in case of the grantor being adjudged bankrupt within ten years of its making, unless it can be shown that he was able to pay all his debts at the time of making it without the aid of the property settled (46 & 47 Vict. c. 52, s. 47); and such a deed is also liable to become void at any distance of time under 13 Eliz. c. 5. (See *The Three Towns Building Co.* v. *Maddever.*) So that if your title commences with such a settlement, the purchaser will be likely to call for evidence of the donor's solvency. It is usual to stipulate in this case that he shall be satisfied thereof by a declaration to be made by one of the donor's family. Remember, too, that the conditions should always disclose the nature of a voluntary deed with which the title begins, or which forms a link of the title, and has been executed within ten years of the time of the sale, or else they will be deemed misleading, and the purchaser will be able to refuse to complete. (*Re Marsh and Granville; Re Briggs and Spicer;* but see *Re Vansittart* and *Re Brall*, explained *post*, Part V., under Voluntary Settlements; and see p. 115.)

When a deed is voluntary.

To preclude troublesome inquiries it is often provided that the purchaser shall assume that no holder of the land who died left a widow surviving him who may still be living, and so entitled to dower, which might be the case if such holder was married prior to 1834.

When a question of dower may arise.

If any of the originals of the deeds appearing in the abstract

When

originals are missing.

are missing, the purchaser should be required to accept an attested copy or some other such evidence in proof of them.

When incumbrances exist which cannot be discharged.

When there are any incumbrances on the property which your client cannot discharge, you should make careful provisions for his protection. You must clearly state the fact and nature of such incumbrance, and require the purchaser to make no objection on account of it. It is only fair to offer to give him an indemnity against any charge. Bear in mind that in the absence of stipulation he cannot be forced to complete a contract to buy land which turns out to be subject to irremovable incumbrances, even on being offered an indemnity (*Balmanno* v. *Lumley*); and if the contract provides that the "vendors" shall make a statutory declaration as to a matter affecting the title, which is to be taken as conclusive proof by the purchaser, the purchaser is entitled to strict fulfilment of the proviso, and a declaration of some only of the vendors is not enough. (*London Land Co.* v. *Harris.*)

Provisions of the Conveyancing Act, 1881, as to discharging incumbrances.

In connection with these incumbrances, sect. 5 of the Conveyancing Act, 1881, enables any party to a sale of land subject to incumbrances (whether payable immediately or not) to apply to the Chancery Division, and on paying into court such sum as when invested in government securities may be considered sufficient, by means of the dividends thereof, to keep down any incumbrance to which the land is subject, with such further sum, not exceeding one-tenth of the original amount to be paid in, to meet contingencies, to obtain a declaration that the land is free from the incumbrance. The court, further, has power to direct all needful conveyances to be made, to make vesting orders, and deal with the fund in court, and finally pay it over to the person entitled to it. This provision will prove useful in those cases where the incumbrance cannot be paid off and a sufficient indemnity cannot be given, or an indemnity is refused. (For cases on this section, see *Dickin* v. *Dickin*; *Great Northern Rail. Co.* v. *Sanderson.*)

When a lease is sold.

On a sale of leaseholds it will not be necessary to set out the provisions of the lease, as the purchaser will be deemed to have notice of them. Indeed, it is advisable not to allude to the provisions, as if you do so, and make any misrepresentation or omission of them calculated to mislead the purchaser, the

latter can rescind the contract. (*Weston* v. *Savage*; *Jones* v. *Rimmer*.) An opportunity should be afforded intending purchasers of inspecting the lease at or before the sale.

Conditions as to apportionment of rent when property subject to lease is sold in lots.

When property subject to a lease at an entire rent is sold in lots, or a part only of such property is sold, the conditions should provide for the apportionment of the rent, and the purchaser should be precluded from taking objection in the event of the tenant refusing to concur in the apportionment.

Course to be adopted if title is doubtful.

If your title is doubtful, the best course is to state the facts of the title, and stipulate that the purchaser shall take such title as the vendor has; for a purchaser in such a case cannot then complain if he gets a defective title. (*Freme* v. *Wright*.) It is well, also, to bear in mind that if the conditions expressly provide that a good title shall be shown, and the title is defective, the fact that the purchaser knew of the defect will not prevent him getting out of the contract. (*Re Gloag and Miller*; *Cato* v. *Thompson*.)

Summary method of settling disputes between vendors and purchasers.

Should any difficulties arise between you and the purchaser's solicitor in respect of any requisitions or objections or claims to compensation, or any other question arising out of or connected with the contract (not being a question affecting its validity or existence), you may at any time apply in a summary way to a judge in chambers, and obtain his decision thereon. The costs of the application will be in the discretion of the judge. (Vendor and Purchaser Act, 1874, s. 9.)

Proceedings at the auction.

We will now assume that you have prepared all proper and necessary particulars and conditions of sale, and have duly advertised the time and place of the auction. In connection with the proceedings at the auction itself, there are two or three points worthy of your consideration, and these we propose to consider under distinct heads:—

The Vendor's right to bid.

As to the employment of a "puffer."

As the highest bidder at the auction will become the purchaser, and there is nothing to prevent that bid being a very low one, it is evident that there is a great risk of the land being sold at a much less price than it is worth. It became, therefore, the practice for the vendor to employ "puffers" at the sale,

whose business it was to run up the bids in the interest of the vendor. Now, at Law, the private employment of these "puffers" was a fraud, and would vitiate the sale; but in Equity, it seems that one person might be employed to bid secretly in order to prevent the property being sold at an undervalue. (See *Mortimer* v. *Bell*.) The law on the point, however, is now regulated by 30 & 31 Vict. c. 48, which renders the employment of a "puffer" illegal both at Law and in Equity. It further provides that the conditions of sale shall state whether the sale is "without reserve" or not; and if stated to be without reserve, no one can be employed to bid on behalf of the seller. If the right to bid is stated by the conditions to be reserved, the seller or any one person on his behalf may bid at the sale. (See *Gilliatt* v. *Gilliatt*.) Thus, the property may be prevented from being sold at less than its value, and withdrawn in case the reserve price is not reached. The case last cited shows that to avail himself of the right to bid, it is not sufficient for the vendor to state that the sale is subject to a reserve price, but he must state that the right to bid is reserved.

How far can the Conditions be varied at the Sale.

Generally stated, the written conditions cannot be verbally altered.

Shortly stated, the rule is that the written conditions of sale cannot be affected or altered by any verbal changes made at the sale. They must stand as they appear in the writing. The rule at law was that evidence of a parol variation of a written document was totally inadmissible. And even in equity it was only admitted in certain cases of accident, mistake or fraud. Since the Judicature Act of 1873, the equitable rule will prevail; still for most intents and purposes the rule holds good, that written conditions of sale cannot be verbally varied. And this is so even where the purchaser has agreed in writing to abide by the supplementary conditions and declarations made at the sale. (*Gunnis* v. *Erhart*; *Higginson* v. *Clowes*.)

How the question of a parol variation may arise:

(a) The vendor or purchaser may seek

This point as to parol variation of the conditions of sale generally arises in an action for specific performance of the contract, brought either by the vendor or the purchaser. It may arise in two ways:—(a) The vendor may bring an action for specific performance against the purchaser, seeking to have the

contract carried out, not simply as it appears from the writing, but with a parol variation made, as he alleges, at the time of sale. In such a case the rule is that he will not be allowed to adduce evidence of such parol variation. To this rule, however, an exception has been established, and this is where the parol variation is one which alters the written contract in the favour of the defendant. (*Martin* v. *Pycroft*.) The same rule applies to a purchaser seeking specific performance with a parol variation. When, however, there has been a part performance of the parol variation alleged, if it amounts to such a part performance of that variation as would justify the court in ordering specific performance had the variation been itself a new contract, then the court will generally enforce specific performance of the original contract as modified or altered by the variation. (b) But when a vendor or a purchaser is resisting specific performance he may go into parol evidence to show that by fraud, accident or mistake the written agreement does not contain the real terms arrived at by the parties. The reason of this being that the Statute of Frauds does not say that a written agreement shall bind the party who has signed it, but that an unwritten one shall not bind him.

specific performance;

(b) The vendor or purchaser may resist specific performance.

For further particulars on the subject of the parol variation of a written contract in actions for specific performance, we must refer you to some book on the Principles of Equity.

The only safe way, then, if the conditions are in anywise altered or added to at the auction, is to embody the alteration or addition in the original conditions, and see that the purchaser or the vendor, as the case may be, signs them with full knowledge of the variation.

CHAPTER IV.

CONTRACT FOR SALE AND PURCHASE.

Private contracts for sale.

The auction completed, and a purchaser found, the next step is to prepare the abstract of title. But it will, perhaps, be advisable to break off the continuity of our history for a while, and, before going into the subject of abstracts, to treat of private contracts for sale. For, these disposed of, our subsequent chapters will relate to the proceedings on a sale, whether that sale be by public auction or private contract.

In treating of the stipulations which should be included in the conditions of sale, we have anticipated all that is necessary to be said with regard to the provisions which should be inserted in a contract. For, with the exception of the conditions relating to the auction, all the stipulations which you would comprise in particulars and conditions of sale you would, under the same circumstances, include in a private contract. There is, however, this difference, that in framing a private contract, you need not be so chary about inserting stringent conditions; for, as the purchaser has probably made up his mind to buy, he is not likely to be frightened from his bargain by their stringency, and there is no fear of "damping the sale."

preparation of.

Divisions of the subject.

We propose to treat of the subject of contracts under the following four heads:

I. What is an interest in land within the 4th section of the Statute of Frauds.

II. What are the requisites of a valid contract under that statute.

III. What acts of part performance will take a case out of the statute.

IV. What is the position of the parties after the contract has been made.

I. What is an interest in Land within the 4th Section of the Statute of Frauds.

The 4th section of the statute provides that no action shall be brought on any contract for the sale of lands, tenements, or hereditaments, *or any interest in or concerning them*, unless the contract is in writing, signed by the party to be charged, or some person authorized by him. As to what constitutes an interest in land under the section, the decisions are many and conflicting. The following points are worthy of your consideration:—

The 4th section of the Statute of Frauds.

What is "an interest in land?"

Is a contract for the sale of "growing crops" within the statute? *i.e.*, is a growing crop an "interest in land"? It seems that if the crop sold is a "*fructus naturalis*," such as growing grass, timber, or underwood, the contract must be in writing: but if it is a "*fructus industrialis*," *i.e.*, a crop not produced spontaneously, but raised by the labour of man, *e.g.*, corn, potatoes, or turnips, writing is not necessary under this section. (*Evans* v. *Roberts.*)

Fructus naturalis is;

Fructus industrialis is not;

Whether a contract for the sale of hops or clover is within the clause is doubtful. (See, on the one side, *Waddington* v. *Bristowe* and *Rodwell* v. *Phillips*, and on the other, *Graves* v. *Weld.*) A sale of hops is probably not a sale of an interest in land, as hops pass, under the head of "emblements," to a deceased owner's personal representatives; while a sale of clover, which is not an emblement, as it does not come to perfection within a year of sowing, is probably a contract concerning an interest in land within the clause.

Hops and clover are doubtful;

A contract for the sale of growing timber is within the statute, unless by the terms of the contract it is to be cut by the vendor and delivered by him, or it is to be cut at once either by the vendor or purchaser; since, in that event the contract is regarded as one for the sale of goods. (*Marshall* v. *Green* and *Smith* v. *Surman.*)

Growing timber.

Contracts for the sale of shares in mines are within the section, as are contracts for leases and the sale of leasehold interests in land; so, too, are contracts for sale of debentures. (*Driver* v. *Broad.*)

Shares in mines are;

Contracts for leases are;

Contracts for taking or letting furnished lodgings are within

Contracts to

take furnished lodgings:

the statute, if any specific rooms are let (*Inman* v. *Sharp*); but a contract to live in a boarding house is not within it, as there is no intention to give the lodger the right to the exclusive occupation of any particular part of the house.

Tenant's fixtures are not;

An agreement for the sale of tenant's fixtures is not within the section (*Lee* v. *Risdon*); although a charge on machinery, so far as it affects trade fixtures, has recently been held to be within the section (*Jarvis* v. *Jarvis*); nor is an agreement to build a house, though implying a licence to go on the land, though a contract for the sale of buildings to be taken down and cleared away by the purchaser within a given time, does concern lands so as to require writing and signature within the section. (*Lavery* v. *Purcell*.)

nor an agreement to build.

Sales by court are not.

Sales by the court are not within the section; the object of the section was to prevent fraud, and, on a sale by the court, there is no likelihood, or, indeed, possibility of a fraud being perpetrated. (*Attorney-General* v. *Day*.)

II. The Requisites of a Valid Contract.

Particulars which must appear in a valid contract.

The contract must be signed by the party to be charged or his agent (who may be appointed by parol); it is not necessary that it should be signed by both parties. It is necessary for the following particulars to appear—(a) the consideration, (b) the subject-matter of the sale, (c) the names or description of buyer and seller, (d) the terms of the contract.

Position of signature.

The signature need not be at the end of the contract, it may be at the beginning or in any part, but it must appear in writing somewhere. (*Saunderson* v. *Jackson*; *Hubert* v. *Treherne*.) Where a contract purported to be made between certain persons whose names appeared at the commencement, and ended "As witness our hands," and no signatures followed this testatum, it was held that this was not a sufficient signing within the statute.

Description of parties.

As we have already seen, it is not necessary for the buyer's or the seller's name to appear (except in so far that the contract must be signed by the party to be charged), but a mere description of them is sufficient, provided it be clear enough to designate who they respectively are. It may be sufficient to describe the vendor as the "landlord" of the property. (*Ward* v. *Ponard*;

but see *Coombs* v. *Wilkes*.) From the decision in *Prattle* v. *Anstruther*, it would appear that the description "mortgagee" may be sufficient description.

Agreement may incorporate by reference other documents.

The rule is, that the agreement, as appearing in the writing, must comprehend all the terms of the contract, and no parol evidence will in general be allowed to add to, vary or explain it. But if it refers to some other writing or document containing further terms, such further document will be considered as incorporated, and be received in evidence to show what the terms of the contract are. (*Ridgway* v. *Wharton*.)

When letters constitute a contract.

Sometimes the existence of a contract will have to be gathered from a correspondence. In such cases the rule is, that "there must be an unqualified acceptance of the offer, and no new term must be introduced." If a new term is introduced, there is no contract. (*Lewis* v. *Brass*.) And the letters must show a complete contract without the aid of parol evidence to connect them. (But see *Oliver* v. *Hunting*.)

When letters do not constitute a contract.

In some cases, the acceptance of an offer is accompanied by an understanding, express or implied, that a formal contract shall be prepared. Here the question may arise, whether there has been a simple acceptance of the proposal, with a suggestion as to the future course to be pursued, or whether there has been a mere conditional acceptance, and the parties do not intend to consider themselves bound until they are irrevocably so by the subsequent formal instrument alluded to. Thus A. may write to B. and say, "I will sell you Blackacre for a thousand pounds," and B. may reply, "I will take it at that price, subject to the title being approved of by my solicitor." Here the question arises—Has B. accepted A.'s offer simply, or has he introduced a new term into the contract which will require A.'s unqualified assent before the agreement can become binding? The leading case on the point is *Hussey* v. *Horne-Payne*, and other important cases are *Lewis* v. *Brass* (*supra*), *Bransom* v. *Stannard*, *Rossiter* v. *Miller*, *Bonnewell* v. *Jenkins*, *Crossley* v. *Maycock*, and *Eadie* v. *Addison*. The rule to be deduced from them is, that where an offer is accepted simply, but the acceptance is accompanied by a statement which in effect expresses the acceptor's desire that the terms of the contract shall be embodied in a more formal document, the addition will not prevent the offer and acceptance from constituting a binding contract;

Rule deducible from cases.

but if it appears from the reference to the subsequent and more formal contract that either party intended *that* to be the binding instrument, then the mere offer and acceptance will not form a binding agreement. (And see the quite recent case, *Page* v. *Norfolk.*)

Withdrawal of offer.

In connection with these offers and acceptances, remember that an offer may be withdrawn at any time before it is accepted (*Dickenson* v. *Dodds*); and that the offer will be irrevocable by the writer from the time that the acceptance is posted (*Thomas* v. *Blackman*), and this, although in the meantime the offerer has posted a letter withdrawing the offer, provided that letter had not reached its destination before the letter of acceptance was posted, since a revocation of an offer is of no avail until it is brought to the mind of the offeree. (*Henthorn* v. *Fraser.*) Further, if the offer stipulates that the acceptance shall be made by a fixed day, if the acceptance is made by that day there will be a binding contract, although by some delay the letter containing the acceptance does not reach the person who made the offer till after the day named. (*Adams* v. *Linsell.*) The same rule applies, even though the letter of acceptance never reach the offerer. (*Household Insurance Co.* v. *Grant.*) When the contract is contained in letters, the whole correspondence is to be looked at; yet if once a definite offer has been made, and it has been accepted without qualification, and it appears that the letters of offer and acceptance contained all the terms agreed on between the parties, the complete contract thus arrived at cannot be affected by subsequent negotiation. When once it is shown that there is a complete contract, further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. (*Bellamy* v. *Debenham.*)

III. What Acts of Part Performance will take a Case out of the Statute.

The doctrine of part performance is equitable.

At law, if the Statute of Frauds was not complied with, there was no remedy. But courts of equity would carry into effect an agreement which was not actionable for not complying with the statute, when there had been sufficient performance of any obligation which would have arisen had the contract been valid. So that when one party does, for another's benefit, any act which

he would not be supposed to do unless it was in fulfilment of some contract between the two, equity will not allow the party who has reaped the benefit to escape his liabilities under the agreement on the mere ground that he is not bound, because the contract is not in writing as required by the statute.

Three tests to apply to ascertain whether any sufficient act of part performance: (1) Is the act referable to agreement?

In determining whether any specified act amounts to sufficient part performance of an alleged contract (which ought to be in writing, but is not), there are three tests to be applied to ascertain if it is such as will take the case out of the statute. These are—(1) Is the act such as is not only referable to an agreement such as that alleged, but such as is referable to no other title? If the act might have been done with other views than those of performing the alleged contract, it will not take the case out of the statute. Thus, where a tenant in possession sued for the specific performance of an alleged contract for a lease, and set up his possession as an act of part performance, it was held not to be such, because his possession might be accounted for on other grounds than the agreement, *e.g.*, his character as a tenant. (*Wills* v. *Stradling*.) Again, in *Maddison* v. *Alderson*, where a master made a verbal bargain with his housekeeper that, instead of paying her wages as theretofore, he would leave her by his will a life estate in landed property and he did not do so, it was held that the services rendered by the housekeeper were not acts of part performance, taking the case out of the statute. (2) Is the act merely introductory or ancillary to an agreement? If so, it does not constitute sufficient part performance. Thus, the delivering of an abstract of title, giving directions for conveyances, going to view the estate, making valuations, measuring the lands, and other acts of a like preliminary nature, are not sufficient part performance. (3) Is the act capable of being undone, leaving the parties in their original positions? If so, it is not a sufficient part performance. Thus, payment of a part, or even of the whole, of the purchase-money, will not take a case out of the statute. (*Clinan* v. *Cooke*.)

(2) Is it merely introductory?

(3) Is it capable of being undone?

It was thought at one time that the doctrine of part performance could only be applied to contracts for the sale of some actual interest in lands (*Britain* v. *Rossiter*), but it has been recently held, in *McManus* v. *Cooke*, that the doctrine applies to

the contract for the sale of interests connected with land, *e.g.*, a contract for the grant of an easement of light.

For further information on this important subject of part performance we must refer you to some treatise on the Principles of Equity.

IV. The Effect of the Contract on the Position of the Parties.

Consideration of the subject.

We propose to consider this subject under the following four heads:—

(a) The position of the parties after the contract.

(b) How this position is affected by the bankruptcy of either of them.

(c) How this position is affected by the death of either of them.

(d) The remedies for breach of the contract.

(a) *The Position of the Parties after the Contract.*

The vendor becomes trustee for the purchaser of the property,

The immediate result of the contract is that the vendor becomes a trustee of the property for the purchaser, and the purchaser a trustee of the purchase-money for the vendor, subject to the obligation of the latter to show that he has a good title. (It is not, however, necessary that the vendor have a good title at the time of the contract, if he can procure one at any time before the time fixed for completion, provided he did not sell knowing that he had no title: *Chamberlain* v. *Lee*.) Thus, then, the purchaser, being in equity the owner of the property, even before the conveyance has been made to him, is entitled, on the one hand, to any benefits that may accrue to the estate between the contract and the conveyance—such as an increase or improvement in the value of the land (*Harford* v. *Purrier*), and this even where the increase of value may have arisen through the expenditure of the vendor (*Monro* v. *Taylor*); and, on the other hand, the purchaser will have to sustain any loss or deterioration (other than a loss or deterioration of such a character that the vendor in his position of quasi-trustee for the purchaser, ought to have prevented it, *e.g.*, injury done to the property by trespass: *Clark* v. *Ramuz*; *Tempest* v. *Sylvester*), which results to the property between contract and conveyance. So that if a

man contracts to buy a house, and before the conveyance of it to him it is burnt down, he will, nevertheless, have to fulfil his contract, and, at the same time, bear the loss. (*Paine* v. *Miller*.) Further, the vendor may receive the insurance money where the house has been insured, and, having received it, will be entitled to retain it as against the purchaser, and does not stand in the position of trustee of it for the purchaser (*Rayner* v. *Preston*); and though, after receipt of the purchase-money, the vendor cannot retain the insurance money, but must refund it to the insurance company, yet the purchaser has no claim to the money. (*Castellain* v. *Preston*.) You should, then, acting for the purchaser, see that the contract contains a clause that the benefit of any existing insurance should belong to the purchaser; or, in default of this, enter the name of the purchaser in the books of the insurance company as being interested in the premises insured; or, if this is not practicable, or not desirable, owing to the existing policy of insurance having nearly expired, effect a new policy in the name of the purchaser.

but not of insurance moneys in case of fire.

Where a purchaser has neglected to take some such step, and a fire happens, and the property bought is destroyed after the contract, and before completion, the only possible course open to the purchaser to procure the benefit of an existing policy effected by the vendor, would be to give notice, as a person interested in the premises within the meaning of 14 Geo. 3, c. 78, to the insurance company to lay out the money in rebuilding the destroyed premises, instead of paying over the money to the vendor. But whether the statute applies to such a case has not been decided.

14 Geo. 3, c. 78.

The purchaser should always be cautious in taking possession of the premises before completion. He will not, it is true, make himself liable for "use and occupation" should the matter go off (*Winterbottom* v. *Ingham*), but the taking of possession may in some circumstances amount to a waiver of objections to the title. To have this effect, however, the possession must be taken under such circumstances as reveal in the purchaser conduct inconsistent with an intention to insist on objections to the title. (*Fleetwood* v. *Green*.)

Purchaser taking possession may waive objections as to title.

(b) *The Effect of Bankruptcy of one of the Parties.*

Trustee in bankruptcy will stand in place of vendor or purchaser;

When a man becomes bankrupt all his property (which will include the benefit of any contract he may have entered into) will pass to his trustee. The result is, that the trustee in bankruptcy of an insolvent vendor or purchaser will stand in his place, and be entitled to enforce the contract and to compel the purchaser to pay the purchase-money and take a conveyance of the estate; and, on the other hand (subject to the trustee's power to disclaim), the purchaser, on tendering the purchase-money, can require the trustee to complete the contract. And where the purchaser becomes bankrupt, the vendor (subject to the trustee's disclaimer) can require the trustee to take a conveyance, and will then be entitled to prove for the purchase-money owing: and in the same way, the purchaser's trustee, on paying the purchase-money in full, can require the vendor to convey to him. The vendor has a lien on the estate, and is not bound to relinquish it unless he gets payment in full.

but has a power of disclaimer.

The trustee in bankruptcy has, by sect. 55 of the Bankruptcy Act, 1883 (as amended by sect. 13 of the Bankruptcy Act, 1890), power to disclaim an unprofitable contract. This he may do in writing, signed by him, at any time within twelve months of the first appointment of a trustee, or, when he does not become aware of the contract within one month of such appointment, then within twelve months after the time he first becomes aware of it. A disclaimer will, in effect, put an end to the contract, and any person injured by the disclaimer will be deemed a creditor to the extent of the injury, and may prove the same as a debt under the bankruptcy. The trustee may be forced to make a disclaimer in a shorter time than that above mentioned, by applying to him in writing and requiring him to decide whether he will disclaim or not. The trustee must then make his decision within twenty-eight days of receiving the application (or within such extended time as the court shall allow), or else he will be deemed to have adopted the contract. For further information on this important subject of disclaimer, we must refer you to some book on Bankruptcy.

(c) *The Death of either Party.*

This will not put an end to the contract; the effect on the contract differs according as the party who dies is the vendor or purchaser. Firstly, as to the death of the vendor:—

On death of vendor his personal representatives have right to purchase-money;

On this occurring, his executors will be entitled to the purchase-money, unless, indeed, he has, subsequently to the contract, specifically devised the lands. (*Drant* v. *Vause*.) As to the person who is to convey, there is more difficulty. If he has died intestate the land will, of course, have passed to his heir; if he has made a will it will have vested in the devisee, in both cases, of course, still subject to the contract. And if the vendor has devised all his trust estates to A., and all his lands to B., the legal estate in the lands contracted to be sold will vest in the devisee A., and not in B. (*Lysaght* v. *Edwards*.) If, then, the heir or devisee is at hand, and under no disability, and willing to execute the conveyance, the purchase-deed should be executed by him. But suppose such person cannot be found, is an infant, or will not convey; in such a case, before the Conveyancing Act of 1881, it was necessary to bring an action for specific performance; for it was held that sect. 48 of the Land Transfer Act, 1875 (now repealed), which enabled the personal representative of a bare trustee who died intestate to convey the trust property, did not apply, because a vendor after contract was not a bare trustee within the section. (*Morgan* v. *Swansea Sanitary Authority*.)

and can convey.

But now, if a vendor dies before completion after 1881, it is provided by sect. 4 of the Conveyancing Act that his personal representative shall have power to convey the land to the purchaser. Consequently, either the heir (or devisee) or the executor (or administrator) can now convey to the purchaser. It is not clear that this section applies to copyholds (though it probably does), and therefore it will be better, in cases of sales of property of that tenure, to take the conveyance from the heir or devisee. Sect. 30 of the Conveyancing Act, 1881, by which, on the death of a trustee in whom the legal estate in lands (other than those of copyhold tenure: see sect. 45 of the Copyhold Act, 1887) is solely vested, the legal estate vests in his personal representatives (that is, his executor or his administrator), does not seem to apply to this particular

species of trust, since, if it were intended to so apply, the provisions of sect. 4 of the act, in giving the personal representatives power to convey, would be superfluous and inconsistent, as, if the legal estate, under sect. 30, vests in them, they must convey. Possibly, however, sect. 30 might apply if at the time of the death the title had been accepted by the purchaser, and there was nothing more to be done than to convey the property to the purchaser.

On death of purchaser, heir or devisee becomes entitled to land;

Secondly, as to the death of the purchaser: if the purchaser dies intestate the right to have the land passes to his heir; if he makes a will, the land, even if the contract for purchase be after the date of the will, passes to the devisee. The question now arises, Will the heir or devisee be entitled to require the purchase-money to be paid out of the personal estate of the testator, or will he take the land subject to the liability to pay for it out of the estate? Formerly he could keep the land and require the personal representatives of the deceased purchaser to pay the price; but the effect of the various acts, formerly known as Locke King's Act and Amendments, but now, by virtue of the Short Titles Act, 1892, as the Real Estates Charges Act, 1854, and Amendments (17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; and 40 & 41 Vict. c. 34) is that the heir or devisee will now take the land subject to and charged with the unpaid purchase-money (both when the land is freehold or copyhold, and when it is leasehold: *Re Kershaw, North* v. *Kershaw*), unless there is some contrary intention (in case of a devise) expressed by the testator. A general direction that the testator's debts shall be paid out of his residuary real or personal estate, or out of his residuary real estate, will not amount to the expression of a "contrary intention." (30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.) These acts do not, however, affect the right of the vendor to compel payment by the personal representatives in the first instance, they only throw the burden ultimately on the heir or devisee.

but takes it *cum onere*.

(d) *The Remedies for Breach of a Contract.*

Under this head we shall consider—(i) The remedy in damages; (ii) the remedy by way of specific performance. And, as arising in connection with these—(iii) the time within

which such remedies must be enforced; and (iv) the lien of the parties on the estate.

When the contract is broken by one party, the other may recover as damages all loss which may fairly and reasonably be considered as arising in the natural course of things from the breach, or such as may reasonably be supposed to have been in the contemplation of both parties at the time of making the contract, as the probable result of the breach. (See *Hadley* v. *Baxendale*.) Thus, in ordinary cases, a purchaser is entitled to recover (1) the deposit he has paid, if any, and, in the absence of stipulation, interest thereon; (2) interest on the purchase-money, if it has been kept lying idle awaiting the completion, and if the vendor has notice of the fact; (3) expenses incurred in investigating the title, &c.; (4) compensation for the loss of a tenant, &c. (*Royal Bristol Permanent Society* v. *Bomash*.) But he cannot recover as damages the loss of profit he sustains by reason of not being able to carry out some subsequent contract to sell the estate, which would result in pecuniary profit to him. (*Flureau* v. *Thornhill; Hopkins* v. *Grazebrook; Bain* v. *Fothergill; Rowe* v. *London School Board;* and *Hyam* v. *Terry*.) He will not be entitled to recover damages for the loss of his bargain, and this whether the breach occurs through a defect in the title or the vendor's wilful default or delay to complete; all the purchaser can claim is the money he has paid, with interest and expenses of investigating the title. If, however, the vendor knew at the time of contract of the resale by the purchaser at a profit, he would be liable to him for the computed loss.

(i) As to the remedy in damages,

in action by the purchaser;

As to the damages which a vendor can claim when the purchaser is the defaulter, he can only recover the loss actually sustained by the breach, *i.e.* the difference, if any, between the price agreed on and the market price of the property, as ascertained by a resale within a reasonable time, and the expenses he has incurred. He is generally, also entitled to the deposit which was paid on signing the contract. (*Howe* v. *Smith; Soaper* v. *Arnold*.)

in action by the vendor.

If the purchaser is desirous of obtaining the land itself, his remedy is an action for specific performance. And as the court acts on the principle that the remedy should be mutual, it will specifically enforce the contract at the instance of the vendor,

(ii) As to the remedy by specific performance: It must be mutual;

though his claim practically is to obtain payment of the purchase-money, and is only connected in a secondary manner with the land. On the same principle, it will not decree specific performance at the suit of an infant, because it would not decree such performance against him, and there is here a lack of that mutuality which the court requires. (*Adderly* v. *Dixon*, and *Flight* v. *Bolland*.) Specific performance of a contract to sell land will be enforced almost as a matter of course, for it is always difficult to say in such cases that damages would sufficiently compensate the disappointed party. There are, however, many grounds on which cause may be shown why a decree should not be granted. Some of these grounds are:—Misrepresentation by the plaintiff; mistake rendering the performance a hardship, or some error which led the defendant into making the contract; some substantial misdescription by the plaintiff, but for which the defendant would not have contracted; the laches of the plaintiff in coming forward to claim his remedy; gross inadequacy of consideration, defective title, and many other reasons.

and so infant cannot obtain it.

Defences to an action for specific performance.

The court is not bound to grant specific performance, even where the plaintiff makes out his right to it. It was expressly empowered by Lord Cairns' Act (21 & 22 Vict. c. 27) to award damages in an action, either in addition to or in lieu of specific performance. And the principle of this act remains in force, notwithstanding its repeal, and notwithstanding the Judicature Acts. (See 46 & 47 Vict. c. 49; and *Middleton* v. *Magnay*; *Tamplin* v. *James*; *White* v. *Boby*.)

Court has discretion to grant.

An action for specific performance will lie to enforce an agreement for a lease, except in the case of a lease from year to year, or where the agreed term has expired or will expire before judgment can be obtained. (*Clayton* v. *Illingworth*, and *Nesbit* v. *Meyer*.) Moreover, a lease for more than three years in writing, but not by deed, and therefore void under 8 & 9 Vict. c. 106, is nevertheless good in equity as an agreement for a lease, and will be specifically enforced. (*Parker* v. *Taswell*.) Indeed, the agreement now, under the fusion effected by the Judicature Act, 1873, after entry by the tenant, answers for most purposes as well as a lease, and specific performance would not in general be required. (See *Walsh* v. *Lonsdale*; *Crump* v. *Temple*; *Swain*

When an action for specific performance will lie to enforce an agreement for a lease.

v. *Luck & Ayres; Strong* v. *Stringer;* and the Conveyancing Act, 1892 (55 & 56 Vict. c. 13, s. 5.)

Before commencing an action on a contract to sell land, whether that action be for specific performance or for damages only, the purchaser must show that there is a valid contract, and, in most cases, that he has tendered a conveyance to the vendor, who has refused to execute it. (*Poole* v. *Hill.*) But he will be excused from tendering a conveyance when the vendor fails to deduce a title, produces a bad one, or wrongfully resells the property. In the same way the vendor, before bringing an action, must prove that he has shown, or offered to show, a good title, and has been always willing and ready to execute a conveyance to the vendee in the terms of the contract. (*Poole* v. *Hill.*) It is not necessary actually to tender a conveyance, unless the contract provided that the vendor was to prepare it.

Before action purchaser must tender conveyance.

On the subject of specific performance we must refer you for fuller particulars to some treatise on the Principles of Equity.

By 21 Jac. 1, c. 16, s. 3, an action on a simple contract must be brought within six years next after the cause of such action shall have arisen, but allowance is made for certain disabilities by sect. 7, and in case of such disabilities, if they are existing at the time the right to bring the action accrues, a further period of six years will be allowed after the removal of the disability.

(iii) As to the time within which the remedies must be sought.

These disabilities (as modified by 19 & 20 Vict. c. 97, s. 10) are infancy and unsoundness of mind: and if the *defendant* is beyond the seas, the action may be brought within six years after he returns. (4 & 5 Anne, c. 16, s. 19). Coverture was formerly a disability; but by the Married Women's Property Act, 1882, a married woman can sue as a *feme sole*, and so coverture is no longer a disability. (*Weldon* v. *Neal.*)

The statute begins to run immediately upon the breach of the contract. When a time is fixed for completion, the breach will occur on default in conveying, or paying the purchase-money at that time, so that the statute will commence to run from the date fixed for completion; but where no time is fixed for completion, the time will run as against the purchaser from a distinct refusal by the vendor to convey, or from some act or occurrence which renders it impossible for him to convey. And as it is the duty of the purchaser to pay the purchase-money

When time begins to run.

(presuming that a good title is made out) upon the tender of a proper and valid conveyance to him, the time will run against the vendor from that date.

The statute only bars the action, not the lien;

It is important to remember that the statute does not extinguish the obligation under the contract, but merely takes away the remedy; so that a vendor's lien would not be destroyed although he might have lost his right to bring an action to recover the purchase-money. (*Spears* v. *Hartley*.) Again, the operation of the statute may be prevented and the obligation under the contract kept intact by a sufficient acknowledgment of the debt. (*Re Hindmarch, The River Steam Co. Case*.) The acknowledgment, however, to be sufficient must be in writing signed by the party to be charged or his agent duly authorized. (9 Geo. 4, c. 14, s. 1, and 19 & 20 Vict. c. 97, s. 13.)

and does not apply to specific performance;

The statute of James does not apply to actions for specific performance, but the rule in equity is that the party seeking relief must be active and energetic and guilty of no laches in coming forward to claim his remedy. The maxim is "*Vigilantibus non dormientibus subvenit æquitas*." So that, in seeking specific performance, the earliest opportunity should be taken of applying to the court for relief, and lapse of time is one of the grounds on which the court will refuse to decree specific performance: thus, in *Eads* v. *Williams*, where the plaintiff delayed three and a-half years in coming forward, that delay proved fatal to his claim to have his contract for a lease enforced. (And see *Mills* v. *Haywood*.) In *Southcombe* v. *The Bishop of Exeter*, a delay of eighteen months was held to have the same effect, and generally, more than a year's delay is fatal to a plaintiff's suit in equity for specific performance. And where one party gives the other notice that he does not intend to perform the contract, a very brief delay by the other in bringing an action for specific performance will induce the court to refuse to make the decree. (*Huxam* v. *Llewellyn*.) But to bar the plaintiff's right the delay must arise from his culpable or unwarrantable laches. So that where he is in possession of the property and has got the equitable estate, and the only object of the action is to obtain the legal estate, the vendor will not be allowed to avail himself by way of defence of the plea that the plaintiff has been a long time in coming

but this remedy is lost by laches.

forward. For in such a case the plaintiff has not been sleeping on his rights, but relying on his equitable title without thinking it necessary to have his legal right perfected. (*Cartan* v. *Bury.*) And *à fortiori* when the delay is caused by the defendant, he cannot allege the delay as a defence. (*Ridgeway* v. *Morton.*) Again, the defendant may deprive himself of the right to allege the plaintiff's delay as a defence by a course of conduct which has led the plaintiff to make the delay, as where he has induced him to believe that he still means to carry out the contract. (*Seton* v. *Slade.*)

(iv) As to the lien of the parties on the estate.

At common law, a lien is the right of a creditor to retain the property of his debtor till the debt is paid, and it ceases when the possession of that property is parted with to the debtor. But the peculiarity of an equitable lien is that it does not depend on the possession of the debtor's property, but, on the other hand, commences only when the possession of that property is parted with. Thus, on a conveyance of land, a vendor has a lien on the estate, though it is not in his possession, for the unpaid purchase-money. So a purchaser sometimes has a lien on the property in respect of the purchase-money he has paid.

The vendor's lien.

Firstly. *As to the Vendor's Lien.*—When the vendor has conveyed the land to the purchaser without having received the purchase-money, or without having received the whole of it, he has a lien on the estate to the extent of the amount remaining unpaid. And this lien he may proceed to enforce by applying to the court either for a sale of the property, or even by an order restoring the possession of it to him. (*Williams* v. *Aylesbury Rail. Co.*)

The purchaser's lien.

Secondly. *As to the Purchaser's Lien.*—When he has paid the whole of his purchase-money, or a part of it, before the conveyance of the property to him, he has a lien to that extent on the land. As was said in *Rose* v. *Watson*, he acquires a lien exactly in the same way as if, upon payment of part of the purchase-money, the vendor had executed a mortgage to him of the estate to that extent; and this lien will extend to the case of a lease, so that an intended lessee, who has entered under the contract and expended money on the land, has a lien on it for the money so expended in the event of the lessor failing to grant a lease. (*Middleton* v. *Magnay.*)

The purchaser's lien extends to all instalments of the purchase-money paid, with interest thereon, to sums paid under the contract as interest on the unpaid purchase-money, and the costs of an unsuccessful action for specific performance (if any) by the vendor against him.

Against what persons the lien will prevail.

A lien extends against the estate in the hands of not only the person entitled to it and his heirs, and persons taking the estate from him as volunteers, but also in the hands of purchasers for value who have notice that the lien exists. And the trustee of a bankrupt will take subject to the lien although he has no notice. (*Ex parte Hanson.*) The lien may be lost by negligence (*Rice* v. *Rice*) or abandonment. The mere taking by the vendor of a security for the payment of the purchase-money will not amount to abandonment, unless it can be construed into an expression of an intention to rely no longer on the estate, but on the purchaser's personal credit (*Macreth* v. *Symmons*); so that he does not waive his lien by taking a bond, or a bill, or a promissory note, unless it appears that those instruments were accepted by him in substitution for the purchase-money. (*Buckland* v. *Pocknell.*)

On the subject of these liens we must refer you for further particulars to some treatise on the Principles of Equity.

There is no necessity to register a contract for the sale and purchase of land in a register county, since it has been held not to be a "conveyance" within the Local Registry Acts. (*Rogers* v. *Harrison and Others.*)

Stamps.

Lastly, you must remember that a contract for the sale of land above 5*l.* value requires to be stamped with a 6*d.* stamp. An adhesive stamp of that value may be and often is affixed to the contract when it is signed, but if not, the stamp can be impressed at any time within fourteen days of the date of the signing of the contract, and afterwards only on the payment of the penalties imposed by the stamp laws. (Stamp Act, 1891, 54 & 55 Vict. c. 39: Schedule.)

If several lots are sold to one purchaser, the agreement must bear as many 6*d.* stamps as there are lots over the value of 5*l.* sold to him. (*James* v. *Shore.*)

If the contract is under seal, as it would be if one of the contracting parties was a corporation, the stamp would be 10*s.*

which, if not impressed at the time of contract, could be impressed at any time within thirty days. (Stamp Act, 1891, s. 15.)

When the property sold is of such a character that it will vest in the purchasers simply by the contract, without a formal conveyance or assignment, *e.g.* an equitable interest in property, the contract must be stamped with an *ad valorem* duty of 10*s.* per cent.; and if a formal conveyance or assignment is afterwards made, it is stamped with a denoting stamp; but for the purposes of obtaining specific performance of the contract, or damages for breach thereof, this provision does not apply, and the ordinary stamp duty of 6*d.*, or 10*s.* if the contract is under seal, will suffice. (See Stamp Act, 1891, s. 59.)

CHAPTER V.

THE ABSTRACT OF TITLE.

The importance of delivery of a perfect abstract.

In drawing the abstract of title you should bear in mind the importance of furnishing the purchaser with a perfect or sufficient abstract, *i. e.*, one which shows that the vendor is either himself competent to convey to, or able otherwise to procure to be vested in, the purchaser the legal and equitable estates of the property sold free from incumbrances. It is not necessary to show that he has the power to do so at the date of the delivery of the abstract, if he can show that he will be in a position at the time fixed for completion to acquire and pass to the purchaser an indisputable right to the legal and equitable estates (*Cattell* v. *Corral*); but if the abstract shows that there are any incumbrancers whose concurrence he cannot insist upon, then the abstract will be an imperfect one. (*Lewis* v. *Guest.*)

Outstanding mortgages do not make abstract imperfect.

Mortgages and other incumbrances are considered in equity as mere matters of conveyance, *i. e.*, they will not render the abstract imperfect, because they still leave the vendor the power if he uses the necessary means to procure the legal estate. The incumbrancer can be called upon to join in the conveyance. And even where the incumbrances were not mentioned in the contract, and no notice had been given of intention to pay them off, it was held that they did not constitute a defect in the title. (*Savory* v. *Underwood.*) If the vendor will be able to acquire a clear right to the legal and equitable estates before completion, it will not amount to a defect in the title that the conveyance may be delayed by the fact that he has not those estates legally vested in himself and ready to be transferred to a purchaser. Thus in *Cattell* v. *Corral* a good title was held to be deduced where it appeared by the abstract that the vendor was a tenant

in tail in possession and able to convey the estate in fee according to his contract by a deed enrolled. It seems to have been thought unnecessary that he should disentail the property before the time fixed for completion, and so put himself in possession of an estate in fee ready to be conveyed to the purchaser when the time arrived; but this is an extreme case, for if the vendor died before the day of completion it is evident that the purchaser would lose the property; for the issue of a tenant in tail is not bound by the contract of his ancestor, unless, indeed, the contract was made in pursuance of the powers conferred by the Settled Land Acts, 1882—1890.

In quite a recent case trustees contracted to sell the trust property, and the purchaser discovered that they had no power of sale, and refused to complete. Thereupon the tenant for life of the lands offered to assist the trustees in carrying out their contract by conveying the lands to the purchaser under the powers conferred upon him by the Settled Land Acts. The purchaser refused to accept a conveyance from the tenant for life on the ground that he was not the vendor; and the court upheld the contention of the purchaser, and refused to decree performance against him. (*Bryant* v. *Birmingham.*)

You will do well to bear in mind that a vendor who has entered into a contract to sell land, knowing that he has no power to sell, and that he has no right to expect that he can acquire that power, will not be assisted by the court to maintain an action for specific performance. (*Chamberlain* v. *Lee.*)

Root of title should be a deed which deals with both legal and equitable estates.

Even if it entails the necessity of abstracting a deed dated before the time limited by law or the contract as the commencement of the title, it will be well to commence with some deed which deals by way of conveyance with both the legal and equitable estates. A mortgage deed is considered the best with which to start an abstract; and after it comes a purchase deed. An instrument which depends upon some previous instrument for its validity or operation should never be used as the starting point of the abstract. Thus, a will should not be selected, for it would be necessary to show that the testator was in possession at the time of his death, or else to damp the sale with a condition that the purchaser should not require such evidence. And, for-

merly, if you commenced with an appointment under a power, you would have had to have abstracted also the instrument creating the power to appoint; but in sales since 1881 this is unnecessary if the instrument creating the power is dated before the time stipulated orfixed by law for the commencement of the title. (Conveyancing Act, 1881, s. 3, sub-s. 3.)

Whether mortgages must be abstracted.

You should abstract every deed and document which affects or has affected the property. Thus, you should abstract a mortgage, although there has been a reconveyance, for it is not for you to assume that the title has been brought back by the reconveyance to its original state; this is a matter which the purchaser is entitled to consider. Whether equitable mortgages which have been discharged should be abstracted does not appear to be settled; the general practice appears to be to keep them off the abstract. Lord St. Leonards says, that "wherever the vendor's solicitor begins the root of the title he ought to abstract every subsequent deed;" but to this sweeping rule expired leases form an exception, for there appears no valid reason for complicating the abstract with them, since their provisions cannot affect the purchaser, and incumbrances which are registered and which affect the purchasers by reason of the registration need not be abstracted. And remember that, by 22 & 23 Vict. c. 35, s. 24, a seller or his solicitor who conceals any instrument material to the title or any incumbrance from the purchaser or mortgagee, or who falsifies any pedigree on which the title may or does depend, with intent to defraud, is guilty of a misdemeanour, and also liable to an action for damages. Though this statute requires a fraudulent intent to be shown, there is no legal definition of fraud, and it is impossible to say what may or may not amount to fraud.

What Lord St. Leonards says.

Criminal liability for non-disclosure.

Abstract is at vendor's expense.

It is the vendor who bears the expense of the abstract, and this, though, to prepare it, he may require the production of documents not in his possession, and this in spite of sect. 3, sub-sect. 6 of the Conveyancing Act, 1881. (*Johnson* v. *Tustin.*) Formerly, when property was sold in lots, the purchaser was entitled to as many copies of the abstract as there were lots, and this even where the lots were held wholly or partially under a common title. But the Conveyancing Act, 1881, s. 3, sub-s. 7,

provides that, when the lots are all parcel of a plot of land held by a single title, the purchaser shall not, except at his own expense, be entitled to more than one abstract of the common title.

Purchaser's rights as to abstract.

What are the purchaser's rights as to the abstract? It seems that he is entitled to be furnished with one, even though he has agreed to accept the title; it becomes his property in a qualified manner until completion, and if the sale is consummated it becomes his absolutely; but if the sale goes off he must return it to the vendor, and must not even take a copy of it.

Duty of solicitor on receipt of abstract.

Acting as solicitor for the purchaser, your first business on receiving the abstract will be to give it a diligent and searching perusal. And it will perhaps stimulate your ardour (which in the examination of a voluminous and extremely dull abstract is not liable to be over keen), if we remind you that your duty to your client binds you to use all reasonable care and skill, and that if through your negligence he acquires a faulty title you will be responsible to him in damages. The law does not go so far, however, as to compel you to take the property off your client's hands. (*British Investment Co.* v. *Cobbold.*)

Two points to be observed in verification of title.

In the verification of the title, there are two main points as to the object thereof to be kept in mind. The first object is to ascertain if the vendor from his own showing on the abstract has a good title, or at least such a title as he has contracted to sell. This object is to be attained by perusing the abstract with care, and bringing to bear on it all your knowledge of the law of real property. The second object is, presuming that the abstract shows a good title in the vendor, to ascertain that he can sufficiently prove the title as he sets it out in the abstract. This is to be ascertained by an examination of the deeds, documents, &c. abstracted, and such other proper evidence of facts, &c. stated, as may amount to clear evidence of the truth of his statement.

Division of subject.

Our subject, then, may be divided into two parts treating of—

I. Points of law affecting the goodness or otherwise of the title disclosed by the abstract.

II. Points of law relating to the evidence by which that title is to be proved.

I. Points of Law affecting the Goodness or otherwise of the Abstract.

The necessity for a practitioner to be familiar with the older forms of conveyancing.

To discuss with any pretence to thoroughness and detail the innumerable points of law which the multifarious complications besetting a title may give rise to would fill many bulky volumes, so various are the ways in which land may be dealt with, and so numerous the laws which regulate these dealings. All we can do is to endeavour to put before you shortly the principal points of law of which you will find a knowledge indispensable in the examination of an ordinary title. In cases of special complication it is never advisable for you to attempt to deal with the matter yourself; but for your own protection, as well as that of your client, you should not hesitate to lay the abstract before counsel.

In years to come, when the law relating to the transfer of land is put on a permanent basis, and made more simple, as we think it can be made, the ancient laws relating to the conveyance of land will become matters of interest to the antiquarian alone; but at present it is absolutely necessary for the conveyancer to have a knowledge of the old methods by which estates were aliened and the laws which regulated title by alienation. For in investigating a title you may come upon an instrument purporting to convey an estate which is not the ordinary deed of grant used at the present day, and to understand its effect you will have to bring to bear upon it some acquaintance with the legal points concerning it. Thus you may find that one of the deeds appearing in an abstract is a feoffment. Before you can judge whether the feoffment is regular and valid and actually does what it purports to do, you would have to know the manner in which feoffments operated. Thus, then, in the first place, we propose to bring to your notice a few points of law bearing on the old forms of conveyances which you are still likely to meet with in investigating a modern title.

The various kinds of conveyances.

Conveyances are divided into:—1. Common Law Conveyances; and 2. Statutory Conveyances. The 1st class comprises—(1) Feoffments; (2) Gifts; (3) Grants; (4) Leases; (5) Exchanges; (6) Partitions; (7) Releases; (8) Confirmations; (9) Surrenders; (10) Assignments; (11) Defeasances; (12) Dis-

claimers. The 2nd class comprises—(13) Covenants to stand seised; (14) Bargains and Sales; (15) Lease and Release; (16) Statutory Release; (17) Statutory Grant; (18) Appointments under Powers; (19) Assurances under the Fines and Recoveries Act; (20) Concise Conveyances under 8 & 9 Vict. cc. 119, 124, and 25 & 26 Vict c. 53.

In addition to these, however, a title by alienation may accrue by matter of record. Thus you may find that a man acquires his title by—(21) Private Act of Parliament; (22) By a Fine and by a Common Recovery. Again, you may find he acquires his title by—(23) A Devise under a Will. Then, again, his title may accrue by the act of the parties, but not by their intentional act; thus, it may depend on—(24) Occupancy (which includes (a) Adverse Possession, (b) Alluvion, (c) Dereliction, (d) Prescription; (25) Forfeiture. Lastly, a title may accrue by the act of the law independent of the parties themselves; as by—(26) Descent; (27) Escheat; (28) Curtesy; (29) Dower; or (30) Bankruptcy. And in copyhold lands the title may depend on (31) Voluntary Grant and Admittance, Surrender and Admittance, Bargain and Sale and Admittance, or on a Customary Recovery. A few words as to some of the more important of these:

(1) *Feoffments.*

Feoffment still necessary in certain cases.

A feoffment (which may still be made use of at the present day for conveying freehold estates in corporeal hereditaments in possession, and is still necessarily used in certain cases, as, for instance, on the conveyance of gavelkind lands by an infant, but see remarks hereon, *ante*, p. 3) is a very old form of conveyance, and formerly needed nothing but the formal "livery of seisin" to perfect it. Writing, however, was made requisite by the Statute of Frauds, and by 8 & 9 Vict. c. 106, s. 3, a deed became necessary, except in the case of an infant conveying by custom.

Must be accompanied by livery of seisin.

To complete a feoffment proper words of donation and limitation had to be used, and livery of seisin had to be made.

There were two kinds of livery—livery in deed and livery in law: the first was the actual delivery of some symbol of possession of the land with apt words; the second a verbal delivery in

sight of it. Livery in deed transferred the possession at once, but livery in law did not do so till the feoffee made actual entry. Again, livery could only be made by a person who had actual possession at the moment of the livery, and only of corporeal hereditaments. It had also to be made to the freeholder himself; for, if made to a lessee for years, it was void and would not enure to a remainderman. Livery in deed might be given and received by attorney authorized by deed, but such was not the case with livery in law.

(2) *Gifts.*

Gifts also required livery.

These conveyances were used to create estates tail, and differed from a feoffment only in the nature of the estate which passed under them; so that they required livery of seisin to render them effectual.

(3) *Grants.*

The purposes for which grants were used.

These were used in olden times to convey incorporeal hereditaments, including reversions and remainders. Formerly, on the grant of a reversion or remainder, the grantee had to obtain the attornment of the tenant of the particular estate; but 4 & 5 Anne, c. 3, made this unnecessary. Grants are now used to convey corporeal as well as incorporeal hereditaments. (8 & 9 Vict. c. 106.)

(4) *Leases.*

Of these we shall speak in a future page. (See *post*, Part IV., under title "Lessor and Lessee.")

(5) *Exchanges.*

Requisites to a valid exchange.

An exchange is an arrangement by which two persons make mutual grants of their property. To a valid common law exchange there were five requisites:—(a) The two subjects had to be of the same general nature, so that real estate could not be exchanged for personal, though real estate of one kind could be exchanged for real estate of another kind, *e. g.*, socage lands might be exchanged for gavelkind lands (*Minet* v. *Leman*), corporeal for incorporeal hereditaments, land for a fee farm

rent; but the estates had to be of the same quality, so that freeholds could not be exchanged for copyholds or leaseholds, and *vice versâ*. (b) The estates had to be of the same quantity of interest, so that an estate in fee could not be exchanged for an estate for life. (c) The word "exchange" had to be used. (d) Entry was necessary to give the exchange effect; so if either party died before entry his heir might avoid the exchange. But no livery of seisin was required, even though the exchange was of a freehold estate. (e) By the Statute of Frauds the exchange had to be in writing; and now, by 8 & 9 Vict. c. 106, s. 3, it must be by deed.

Exchange under the Inclosure Act, 1845.

Exchanges may also be effected by application to the Board of Agriculture (Land Commissioners) under sect. 147 of the General Inclosure Act, 1845. Application in writing is to be made to them by the parties desirous of effecting an exchange, and the Board, if they think the exchange would be beneficial, may make an order of exchange. A sealed copy will be given to each party, and the lands taken will be subject to the same uses, conditions, charges, incumbrances, &c., as the lands given in exchange. The person to apply for an exchange is the person in possession, unless he is merely a tenant for a term of less than fourteen years, or at a rent equal to two-thirds at least of the assessed value of the land. In that case the reversioner is the person to apply. If the person in possession is a lessee for any other term, or at any other rent, then both he and the person in receipt of the rent reserved by the lease are the persons to make the application. (Sect. 16.) Notice of the proposed exchange must be advertised, and any person entitled to any estate in or charge upon the land proposed to be exchanged may give a notice of dissent, which will effectually prevent the exchange. (Sect. 150.) Copyholds may, with the consent of the lord of the manor, be exchanged for other land, and the land taken in exchange will either be held by copyhold tenure, or may, with the consent of all parties, be declared by the Board to be freehold. (9 & 10 Vict. c. 70, s. 9; 10 & 11 Vict. c. 111, s. 6.)

Exchanges under the Settled Land Act, 1882.

Exchanges may also be effected under the Settled Land Act, 1882; for that act empowers a person who is a tenant for life within that act to exchange the settled lands. But he must give one month's

prior notice to the trustees of the settlement and their solicitor, or if he wishes to exchange the principal mansion or demesnes he must get the consent of the trustees or of the court. (Settled Land Act, 1890); and he cannot exchange settled lands in England for lands out of England. He may accept money for equality of exchange; and in such case it will be paid to the trustees of the settlement, or into court, and will be applicable as "capital money" under the act.

(6) *Partitions.*

When used.

A partition may be resorted to when joint tenants, coparceners, or tenants in common wish to sever their unity of possession. The Statute of Frauds (29 Ch. 2, c. 3) required partition to be in writing, and now by 8 & 9 Vict. c. 106, s. 3, a deed is necessary in all cases.

Partitions: by coparceners by agreement;

Coparceners can make partition by private agreement in four ways:—(1) Where they mutually agree as to the shares each shall take. (2) Where they agree to choose someone to divide the land, in which case they have choice according to seniority. (3) Where the eldest coparcener makes a division of the lands, in which case he or she chooses last. (4) Where the land is divided into shares and then assigned to each co-owner by lot. A deed is necessary by 8 & 9 Vict. c. 106, to complete a partition.

by tenants for life under the Settled Land Acts;

Tenants for life can, under the Settled Land Acts, 1882—1890, effect a partition on making the same compliances with the statute as they would have to do in the case of an exchange under the act.

by co-owners under the Partition Acts;

If any of the co-owners of the land refuses or is incapable of concurring in a partition, his concurrence may be obtained by an action in the Chancery Division. (*Agar* v. *Fairfax.*) But the court will not order a partition as a matter of course. For instance, it will not order it when the property is subject to a trust for sale (*Biggs* v. *Peacock*), as distinguished from a mere power of sale. (*Boyd* v. *Allen.*) Further, by the Partition Acts of 1868 and 1876, the court, instead of ordering a partition, may, in the interest of all parties concerned, or at the request of any party interested (and even though the others are ready to

purchase his share: *Gilbert* v. *Smith*), order a sale and division of the proceeds instead of a partition, and this although some or one of the parties are or is under disability or abroad.

And it has no option, but must make the order for sale, if parties interested to the extent of one-half or more request a sale, unless it sees good reason to the contrary, or unless it allows the others to buy the shares of those who request a sale. (*Pemberton* v. *Barnes*.)

Partitions may also be made by applying to the Board of Agriculture (Land Commissioners) under the Inclosure Act, 1845, s. 13, in which case the partition will be carried into effect by an order of partition.

by parties under the Inclosure Act.

(7) *Releases.*

When used.

These are conveyances of an ulterior interest in lands to a particular tenant or of an undivided share therein to a co-tenant, or of the right to such lands and hereditaments to a person wrongfully in possession thereof. Livery of seisin was not necessary, as the relessee was in possession; but a deed was essential. Releases enure in four ways: (1) by way of *mitter l'estate*, that is, to pass an estate, as where one joint tenant released his share to the other; (2) by way of *mitter le droit*, that is, to pass a right, as where a person who had been disseised released to the disseisor; (3) by way of extinguishment, as where the lord released his seigniory to the tenant; and (4) by way of creation or enlargement of an estate, as where a reversioner released his right to the owner of the particular estate.

(8) *A Confirmation.*

Purposes for which a deed of confirmation is used.

This is a deed by which a conditional or voidable estate is made absolute and unavoidable. There has to be some precedent rightful estate or wrongful estate, to be confirmed in the possession of the person to whom the confirmation is made, so that a person who had only an *interesse termini* cannot receive a confirmation until he has entered.

(9) *Surrenders.*

A surrender is used to yield up a particular estate to the person who has the immediate reversion or remainder.

Requisites to valid surrender.

To make the surrender good, seven requisites are necessary, viz. :—

(a) The surrenderor must have a vested estate. So that a lease for years to commence at a future day cannot be surrendered; for the lessee has no vested interest, but only an *interesse termini*, and, for the like reason, even a present lease, operating at the common law, cannot be the subject of a surrender until the lessee has entered. (*Wallis* v. *Hands.*)

(b) The estate of the surrenderor must be one that can merge in the estate of the surrenderee. So that an estate tail cannot be surrendered, as it will not, owing to the construction put upon the *De Donis* Statute (13 Edw. 1, c. 1) merge in the fee.

(c) The estate of the surrenderor must be of a lower denomination than that of the surrenderee, or at least of the same denomination. So an estate for life cannot be surrendered to a person who has a mere term of years; but a tenant for his own life may surrender to another tenant for life.

(d) The estate of the surrenderee must be the next estate in remainder or reversion, *i.e.*, there must be no estate intervening between the two estates. Thus, if an estate is given to A. for life, remainder to B. in tail, remainder to C. in fee, A. cannot surrender to C., on account of the intervening estate, which prevents a merger.

(e) The surrender must not be of part of the *quantum* of interest. So a lessee for five years cannot surrender three years and keep the other two years to himself.

(f) By the Statute of Frauds, the surrender must (unless it arises by operation of law) always be in writing, and if it is of an interest required by law to be created in writing, then, by 8 & 9 Vict. c. 106, s. 4, it must be by deed.

(10) *Assignments.*

When used.

An assignment is used in all cases where an estate for life or years is transferred from one person to another. An assignment of any interest in land must in all cases be in writing under the Statute of Frauds (29 Car. 2, c. 3), s. 3; and by deed under the Real Property Amendment Act, 1845 (8 & 9 Vict. c. 106), s. 3, even though the interest may have been created verbally.

(11) *Defeasances.*

Defeasances not now in common use.

A defeasance is a collateral deed by which, on certain conditions, an interest created by another deed may be defeated. It is rarely met with in practice.

(12) *Disclaimers.*

The purposes for which a deed of disclaimer is required.

A disclaimer is a deed by which some grant, devise or bequest is renounced. It is most commonly used when trustees wish to decline to act in the trusts of some will or deed. A person may disclaim an interest provided he has done no act showing his assent. The subject of disclaimer is treated of in a subsequent chapter.

(13) *Covenants to stand Seised.*

When used.

This is a conveyance by which a person covenants that he will stand seised of lands to the use of his wife, parent, child, or kinsman. The consideration of the covenant is natural love and affection. The covenantor is seised to the use of the covenantee; this use is, by the Statute of Uses, turned into the legal estate.

(14) *Bargains and Sales.*

The purposes for which bargains and sales are used.

Bargains and sales may still sometimes be made use of. Prior to the Statute of Uses, a bargain and sale of lands, accompanied by a money payment, made the bargainor seised to the use of the bargainee (or purchaser), and so gave the bargainee the equitable right to the lands, the legal estate remaining in the bargainor. When the Statute of Uses (27 Hen. 8, c. 10) was passed the use was transferred into possession, and thus the

legal estate became vested in the bargainee. By the Statute of Enrolments (27 Hen. 8, c. 16), a bargain and sale of a freehold estate must be by deed and publicly enrolled—a statutory provision intended to give publicity to the conveyance, which was evaded by means of a bargain and sale for a term, followed by a release, as is explained more fully *infra*. There is also a common law bargain and sale which does not require enrolment. Such a conveyance is sometimes used by executors when conveying lands under some statutory or other power, and when the lands have not been devised to them.

(15) *Lease and Release.*

Lease and release may still be used.

How it operates as a conveyance.

This is a species of conveyance which you will constantly be meeting with in investigating titles, and which may be employed even at the present day. We have seen what a bargain and sale is; we have further seen that the Statute of Uses had the following effect on bargains and sales. By the payment of the consideration the bargainor became seised to the use of the bargainee; the Statute of Uses said that he who had the use should be deemed in lawful seisin and possession of the land. Thus the bargainee, without the necessity of actual entry, and without livery of seisin, became, by virtue of that statute, legally seised in fee in possession, and as a consequence thereof it became possible to make secret conveyances, a result which was considered very undesirable in those days. Consequently 27 Hen. 8, c. 16, was passed, requiring all bargains and sales of freeholds to be by deed enrolled within six months from their date, and thus it was hoped that publicity would be given to all transfers of land. But it was soon discovered that this statute did not apply to bargains and sales for a term of years, and that these, therefore, did not require enrolment. By making a lease, then, to a purchaser under a bargain and sale for a year, the lessee was placed in legal possession of the land without any public entry, which is necessary under a common law lease, and was in a position to receive a release of the reversion in fee, and the final result was that he thus acquired a fee simple estate just as if he had been publicly enfeoffed. This method of conveying by means of a lease and release continued down to 1841, when

The Inrolment Act,

and its evasion.

Lease and release gave way to statutory release.

an act (now repealed) was passed which provided that a release *expressed to be made in pursuance of the act* should answer the same purpose as a lease followed by a release answered before the act. (4 & 5 Vict. c. 21.)

Common law and statutory leases.

It should be mentioned that there was also a common law conveyance of "lease and release," invented with the same object, viz., the secret transfer of land, and whence the name and idea of the above conveyance under the Statute of Uses were derived; but the objection to the common law lease and release was that *entry* by the lessee was necessary before he could accept the release, and this entry gave publicity to the transaction, which was avoided in the case of a lease made by way of bargain and sale and money payment, the Statute of Uses giving the possession without entry.

(16) *Statutory Release.*

Now abolished.

We have sufficiently discussed this under the preceding head, and we need merely remark that this form of conveyance can no longer be used, the statute which authorized its employment (4 & 5 Vict. c. 21) having been repealed.

(17) *Statutory Grant.*

The modern conveyance.

This is the ordinary conveyance of the present day to convey corporeal and incorporeal hereditaments from one person to another. It must be by deed; the proper operative word is "grant," but any other word showing the intention is sufficient. (44 & 45 Vict. c. 41, s. 49.)

(18) *Appointments under Powers.*

The formalities of the instrument giving the power must be strictly complied with.

In executing an appointment under a power, the forms which are required by the power must be rigorously followed out. The High Court will sometimes remedy the defective execution of powers, but it will only do so in favour of certain persons, and only when the defect is not of the essence of the power. (See *Tollet* v. *Tollet*.)

Statutory modifications of this rule.

The strictness of the common law on the point is now modified by two statutes; the first being the Wills Act, 1837 (1 Vict.

c. 26, s. 10), which provides that every will, executed with the formalities therein prescribed for the execution of wills generally, shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will (which will not include a power to appoint by "any deed or writing" (*West* v. *Ray*)), notwithstanding that the power shall have required some additional or other form of execution or other solemnity; the second being 22 & 23 Vict. c. 35, which, by sect. 12, provides that a deed executed in the presence of and attested by two witnesses in the manner in which deeds are ordinarily executed, shall, as far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or instrument in writing not testamentary, notwithstanding that the power names some special or additional mode of execution; but this is not to operate so as to enable the consent of any person whose consent is made necessary to the execution of the power to be dispensed with. Note, too, that by 1 Will. 4, c. 46, and 37 & 38 Vict. c. 37, the doctrine of illusory appointments is abolished, so that it is now no longer necessary to appoint some share, at least, to all the objects of a special power in favour of several objects. Further note, that by the Wills Act, 1837, a general devise of the testator's real estate will pass any real property over which he has a general power of appointment. And a general bequest of his personal estate will likewise pass personal property over which he has a general power of appointment, unless in both cases a contrary intention, *e.g.*, a direction that the power shall be expressly referred to when executed (*Phillips* v. *Cayley; Re Tarrant's Trust*), appear by the will; and a will may be a good execution of a power, though executed before the creation of the power. (*Stillman* v. *Weedon.*) The legal disability of coverture does not affect the ability to exercise a power of appointment, nor does that of infancy preclude the exercise *by deed* of a power over personal property, or of a power collateral over real property. (*Re D'Angibau, Andrews* v. *Andrews.*) The excessive execution of a power is void as to the excess only, so that if A. has power to lease for twenty-one years, and leases for forty, the lease is nevertheless good for twenty-one years. We treat of this subject more fully in subsequent chapters.

(19) *Assurances under the Fines and Recoveries Act.*

Deeds under 3 & 4 Will. 4, c. 7;

These are treated of hereafter under title "Disentailing Assurances."

(20) *Concise Conveyances.*

and under 8 & 9 Vict. cc. 119, 124; 25 & 26 Vict. c. 53.

Three statutes (8 & 9 Vict. c. 119, s. 7; c. 124, s. 7; 25 & 26 Vict. c. 53) were passed with the object of introducing into use short statutory forms of conveyances and leases, but these enactments have been practically dead letters. The first-named act, relating to conveyances, was repealed by the Conveyancing Act, 1881, but the latter statute is still in force, and since the Solicitors' Remuneration Act and Order have made the remuneration of a solicitor cease to depend on the length of a document, there is no reason why advantage should not now be taken of these statutory forms of leases.

(21) *Private Acts of Parliament.*

Private Acts of Parliament as a method of conveyance.

These are sometimes made use of when an estate is so fettered or is subject to latent claims in such a way that it is impossible to clear the title except with the aid of the supreme and uncontrovertible powers of Parliament.

(22) *Fines and Recoveries.*

Fines and recoveries are abolished, and rarely met with in abstracts.

Both fines and recoveries were abolished by the statute 3 & 4 Will. 4, c. 74, but you may still sometimes meet with them in perusing an abstract of title.

Their complicated nature, however, will not allow us to discuss them, and, for information, we would refer the reader to the notes to *Taltarum's case*, in Tudor's Leading Cases in Conveyancing, or to some work dealing specially with the law of real property.

(23) *A Devise.*

Devises as a method of conveyance.

Of this we shall speak at length when treating of the subject of Wills.

(24) *Title by Occupancy.*

Formerly two cases in which occupancy could occur—

Occupancy, generally, is the taking possession of those things which theretofore belonged to nobody. With regard to real property, there was only one instance of it, *i. e.*, where a tenant *pur autre vie* died during the lifetime of the *cestui que vie*, without having alienated his estate by act *inter vivos*. The first person who entered on the lands could keep them during the *cestui que vie's* life as *general occupant*, unless the grant had been made to the tenant *pur autre vie and his heirs*, for then the heir succeeded as *special* occupant. *Special* occupancy still occurs, when an estate *pur autre vie* is granted to a man and his heirs, and the tenant dies without a will; but *general* occupancy was abolished by the Statute of Frauds, which enabled the tenant to dispose of the estate by his will, and provided that if he did not do so, the estate should be chargeable in the hands of the heir (if it came to him under a special occupancy) as assets by descent; and that if there were no special occupant it should go to the executor or administrator as assets. By 14 Geo. 2, c. 20, if there was no special occupant, and the estate was not devised, it was to be applied and distributed in the same manner as the personal estate of the testator or intestate. These provisions were repealed, but virtually re-enacted, by the Wills Act, 1837, ss. 3, 6.

(1) general occupancy;

(2) special occupancy.

As we stated, occupancy includes titles by (a) Adverse Possession, (b) Alluvion, (c) Dereliction, and (d) Prescription. A few words as to each of these.

(a) *Adverse Possession.*

Title by adverse possession may arise in five ways.

This may be obtained in five ways—(i) By Abatement, *i. e.*, the wrongful entry by a stranger, on the death of a person seised of an inheritance, before the heir or devisee entered. (ii) By Disseisin, *i. e.*, the wrongful putting out of him who is seised of the freehold in actual possession. (iii) By Intrusion, *i. e.*, the wrongful entry by a stranger, after the determination of a particular estate, before the remainderman or reversioner entered. (iv) By Discontinuance. This formerly arose where a tenant in tail conveyed the lands to another in fee simple; the effect of which was to confer an estate in fee simple *by wrong*

on the alienee, and operated as a *discontinuance* of the estate tail, and the issue had to pursue their remedy to recover the lands. But this cannot now occur, as by 8 & 9 Vict. c. 106, a feoffment has no tortious or wrongful operation, and such a conveyance would operate innocently, and merely pass an estate for the life of the grantor. (v) By Deforcement, *i. e.*, the holding of any lands to which another has a right.

The length of adverse possession which is necessary to give the person holding it an indefeasible right to the property is now regulated by the Statutes of Limitation (3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57). As a purchaser may be compelled to accept a title depending on the Statutes of Limitation (*Scott* v. *Nixon*; *Sands* to *Thompson*; *Games* v. *Bonner*), provided the vendor has a right of way to the land (*Wilks* v. *Greenaway*), it will be necessary for you to know the provisions of these two statutes. To attempt to set them out would be impossible within the limits which we have at command, and you must refer to the statutes themselves for information. (See Gibson & Weldon's Student's Statute Law, under title "Limitation of Actions.")

The length of adverse possession is regulated by Statutes of Limitation.

(b) *Alluvion.*

A title to land may be gained by alluvion, *i. e.*, by the washing up of land by the sea, or the waters of a river. Thus, if the alluvion is sudden and considerable, and is caused by the sea, the land washed up belongs to the crown; but if otherwise, it belongs to the owner of the lands adjoining; for the maxim is, *De minimis non curat lex.* And if an island arises in the middle of a river, it belongs equally to the owners of the opposite shores; but if it is nearer one bank than another, it belongs to the proprietor of the bank which is nearest to it.

How a title by alluvion is gained;

(c) *Dereliction.*

Dereliction, *i. e.*, the receding of water, leaving the land high and dry. The same rules as apply to alluvion apply equally to dereliction.

and how a title by dereliction.

(d) *Prescription.*

Prescription is the title acquired to an incorporeal hereditament by mere usage of enjoyment on the part of some person or

Prescription at common law;

his ancestors, or of those whose estate he has. At common law, the right to claim an incorporeal hereditament by virtue of long user of it could be defeated if it could be shown that that user commenced at any time subsequent to the reign of Richard I., though there was a presumption that after twenty years' enjoyment of the right it had been enjoyed from time immemorial. Claims to profits *à prendre*, easements, and other like rights, are now regulated by statute, viz., by the Prescription Act, 1832 (2 & 3 Will. 4, c. 71), which briefly makes the following provisions on the subject:—

by statute.

(1) Claims to rights of common and other profits *à prendre* are not to be defeated after thirty years' enjoyment by showing that the right was first enjoyed at any time prior to such period of thirty years; when the right has been enjoyed for sixty years it will be indefeasible unless had by consent or agreement in writing.

(2) Similar provisions are made as to rights of way and water, except that the periods are twenty and forty years respectively.

(3) A right to light is to be indefeasible after twenty years' uninterrupted enjoyment, unless it has been with consent in writing.

(4) The periods are to be counted back from the commencement of any action questioning the right, and no act is to be deemed an interruption unless acquiesced in for one year after notice.

(5) Time will not run in cases of disabilities, such as infancy, lunacy, tenancy for life, or during action pending, except where the right is declared to be indefeasible.

(6) Where any land over which an easement has been enjoyed is held for a term for life, or for years exceeding three years, the time of such enjoyment during such term is to be excluded in computing the period of forty years in case the claim to such easement be within the three years next after the end of such term resisted by the person entitled to the reversion. This does not apply to a remainderman as distinguished from a reversioner. (*Leake* v. *Symonds*.)

(25) *Forfeiture.*

Title may still accrue by forfeiture, though the abolition of forfeiture for felony by 33 & 34 Vict. c. 23, has taken away one of the chief cases in which forfeiture occurred. How a title by forfeiture may accrue—

Thus lands may still be forfeited by alienation of them contrary to law, as where they are alienated in mortmain, *i.e.*, to a corporation which has no licence to hold land. In such a case the land is forfeited to the lord of the fee. But if the land is held directly of a mesne lord, that lord may enter and hold the land at any time within twelve months from the date of the assurance, and if the land is held of more than one mesne lord in gradation, the superior of those mesne lords may enter and hold the land at any time within six months after the time at which the right of the inferior lord to enter on the land expires. If the right of entry is exercised by a mesne lord, the land is forfeited to that lord instead of to the crown. But the crown can grant licences to assure land in mortmain, in perpetuity or otherwise, and to license corporations to acquire land in mortmain, and hold it in perpetuity or otherwise. (Mortmain Act, 1888, s. 1.) (1) alienation in mortmain;

Again, the right to present to a living may be lost by the neglect of the patron to present in certain cases; and when the presentation has finally lapsed to the crown, the patron loses all his rights with regard to that particular presentation. And the right of presentation may also be forfeited for simony and vested *pro hâc vice* in the crown. Also, where the incumbent is made a bishop, the crown has a right to present to the living for that turn. (2) by patron neglecting to present;

Again, forfeiture may take place by the neglect to perform certain conditions upon which an estate is held. This used most frequently to occur under leases, when the rent limited therein or the covenants and conditions contained therein were not paid, observed and performed; but, as we shall see later on, the liability to forfeiture on this ground has been very considerably curtailed by the Conveyancing Acts, 1881 and 1892. (3) breach of covenant;

Breaches in the observance of copyhold customs are a fruitful source of forfeiture. Thus every alienation contrary to the nature of the customary tenure is a ground of forfeiture to the (4) breach of copyhold customs.

lord of the manor. So also is waste, voluntary or permissive, which is not warranted by the custom of the manor; so also is the refusal to perform the services, to pay the fines or rents. And when copyholds are descendible and are not devised, the heir is bound to come forward on the death of his ancestor and require to be admitted. If he does not do so within the time prescribed by custom, certain proclamations are made, and if he does not appear immediately after the last proclamation the lord may seize the land as forfeited. In some manors the lord can only seize *quousque*, *i. e.*, until some person claims to be admitted. Protection is afforded by statute to infants, married women, lunatics and idiots, entitled to admittance, in consequence of their inability to appear. They are authorized to appear either in person or by their guardian, attorney or committee, and in default of such appearance the lord or his steward may appoint any fit person to be attorney for that purpose only, and by such attorney to admit the person under disability and impose the proper fine. Provisions are made for securing the payment of the fines, and it is provided that no absolute forfeiture of the lands shall be incurred by the neglect of a person under such disabilities to come in and be admitted, or for their omission, denial or refusal to pay the fines due on admittance. (11 Geo. 4 & 1 Will. 4, c. 65; and 16 & 17 Vict. c. 70.)

(26) *Descent.*

Descent now regulated by 3 & 4 Will. 4, c. 106.

The law of descent is now regulated by the Inheritance Act of 1833, 3 & 4 Will. 4, c. 106. This statute does not apply to descents which took place before the 1st January, 1834, so that if, while investigating an abstract, you find that the title depends on a descent which took place before that date, you must apply to it the old canons of descent. These you will find tabulated in Blackstone's Commentaries or in Stephen's Commentaries, Vol. I. The law as to descents which take place after that date is contained in the Inheritance Act, to which you are referred, and an additional provision is made by 22 & 23 Vict. c. 35, ss. 19, 20, the object of which was to prevent escheats. (See fully in your companion volume on Statute Law (Gibson & Weldon's Student's Statute Law, under title Descent).)

(27) *Escheat.*

In consequence of the provisions of the last-mentioned statute, and of 33 & 34 Vict. c. 23, which abolished all escheat for treason, felony and *felo de se*, escheats will so seldom occur at the present day, and they have occurred so seldom within times to which you are likely to extend your investigations in examining an abstract, that it seems desirable to pass this subject by with a bare reference to it. In Stephen's Commentaries, Book II., Pt. I., Ch. XII., you will find all the learning on the point. We may, however, mention, in connection with the law of escheat, the provisions of the Intestates Act, 1884, under which an escheat may occur in cases where before the act there was no escheat. The fourth section of this act provides that when a person dies without an heir and intestate in respect of any real estate consisting of any estate or interest, whether *legal* or *equitable*, in any *incorporeal* hereditament, or of any *equitable estate or interest* in any *corporeal* hereditament, whether devised or not devised to trustees by the will of such person, the law of escheat shall apply in the same manner as if the estate or interest above mentioned were a legal estate in corporeal hereditaments. Prior to this act there was no escheat of an equitable estate, and none of an incorporeal hereditament; but in the case of an equitable owner of lands dying intestate and without heirs, the lands belonged to the trustee freed from the trust (*Attorney-General* v. *Sands*; *Beale* v. *Symonds*; and *Burgess* v. *Wheate*), and in case of the owner of an incorporeal hereditament (*e.g.*, of a rent-charge) dying intestate and without an heir, the rent sank into the land for the benefit of the owner thereof.

Escheat is cut down by the Felony Act, 1870,

but increased by the Intestates Act, 1884.

(28) *Dower.*

The widow's right to dower will be no incumbrance upon the title except in those cases where she was married to the vendor, or someone through whom he claims, before the 2nd Jan., 1834. For, by 3 & 4 Will. 4, c. 105, the husband's conveyance will defeat the right of his wife to dower, and it may also be defeated by a mere declaration in any deed or in his will that she shall not be entitled to it. But whenever you find that the property has passed through the hands of a person who was married before

Statutory dower.

Common law dower.

1834, you should make the inquiry if his wife or widow is still alive, and if she is, require her to join in the conveyance so as to release her right to dower. This we will treat of when we come to speak of purchase deeds. The wife may, of course, have already barred her rights; this she may have done by a fine levied or a recovery suffered by the wife, or by a deed acknowledged under the Fines and Recoveries Act; or if married since 1882, or her title to the dower accrued after that year, though married before 1883, by an ordinary deed of release requiring no acknowledgment (45 & 46 Vict. c. 75, ss. 1 and 5). Or she may have accepted a jointure in lieu of dower. In order to bar the dower effectually the jointure must, under the provisions of the Statute of Uses (27 Hen. 8, c. 10), have the following requisites:—1. It must take effect immediately on the husband's death: 2. It must be for her own life at least; 3. It must be made to the wife herself; 4. It must be made in satisfaction of her whole dower: 5. It must be made before marriage. Again, the right to dower was formerly lost if the husband was convicted of treason; but this cannot now happen, as forfeiture for treason is abolished by 33 & 34 Vict. c. 23. Dower is also forfeited if the husband is divorced from his wife, even for the husband's misconduct (*Frampton* v. *Stapleton*); but it will not be lost by a mere judicial separation. Bear in mind, too, that the old common law dower, that is, of dower of women married before 1st January, 1834, does not attach to an equitable estate or a legal estate unless the husband was solely seised for an estate of inheritance at some time during the coverture, and issue which the wife might have had might have inherited. Nor will it attach when the land has been conveyed to the husband by the usual uses to bar dower; since in this case he does not acquire a legal estate of inheritance. The statutory dower, on the other hand, attaches to equitable as well as legal estates, and to estates to which the husband has a right of entry as well as to those of which he is seised; but it applies only to those estates of which he dies intestate.

Dower, how barred:
(1) by fine or recovery;
(2) deed acknowledged;
(3) jointure;
(4) treason;
(5) divorce.

(29) *Curtesy.*

When curtesy arises.

This can scarcely be called an incumbrance, for if it exists at all it must be an estate in possession, and it is not a right like

common law dower, which may lie hid and then spring up to discomfort a purchaser. For there is no curtesy until the wife is actually dead, and if she conveys away the land during her lifetime the curtesy has never attached. It may be useful, however, to remind you in what cases curtesy attaches. When the husband survives the wife, he will, in case he has had issue by her born alive, capable of inheriting the estate as her heir, become entitled to an estate for his life in such lands of his wife as she was solely and actually (see *Eager* v. *Furnival*) seised of in fee or in tail in possession, whether the estate is legal or equitable; but the estate must not be a joint one, and, except in gavelkind lands, he must have had issue by his wife born alive and capable of inheriting. The curtesy attaches to equitable estates (*Casborne* v. *Scarfe*, and *Appleton* v. *Rowley*), and it attaches notwithstanding the Married Women's Property Act, 1882. (*Hope* v. *Hope*.) However, with regard to property settled on the woman for her separate use, or which comes to her under the Act of 1882, the curtesy will only attach if the woman dies intestate as to the property.

Attaches to equitable estates.

How affected by M. W. P. Act, 1882.

In cases of copyhold lands you should make an inquiry as to what is the custom as to freebench and curtesy, as they differ in different manors according to the custom of the manor.

(30) *Bankruptcy.*

On bankruptcy the lands of the bankrupt vest first in the official receiver and then in the trustee appointed, and this without any conveyance. (See hereon *New Lands Development Association* v. *Gray*.) For full particulars on this subject we must refer you to your Student's Bankruptcy.

(31) *Copyhold Assurances.*

(a) *Voluntary Grants.*—When copyhold lands come into the hands of the lord of the manor by forfeiture or some other means, he may either retain them or make a regrant of them to some fresh tenant; and he may make a regrant even although he be under some disability, such as infancy, lunacy, or the like;

Copyhold assurances: (a) voluntary grants;

for he grants not in his personal capacity but in his official status as "*Dominus pro tempore*" of the manor. The land when regranted will be held by the tenant subject to the custom of the manor. (b) *Surrender and admittance.*—Of this we shall speak when we come to deal with the modes by which copyholds are transferred to a purchaser. (c) *Bargain and sale*—This mode of conveyance is sometimes adopted in the transferring of customary freeholds; but as the fee always remains in the lord, admittance is necessary to perfect the assurance. (See *Duke of Portland* v. *Hill.*) (d) *Customary recovery.*—This was a proceeding by which, before the Fines and Recoveries Act, estates tail in copyholds were barred; it was analogous to the proceeding by recovery adopted to bar estates tail in freeholds; 3 & 4 Will. 4, c. 74, provides means for barring estates tail in copyholds by more simple methods (see in chapter on disentailing assurances, *post*, Part VI.), and customary recoveries are practically obsolete.

(b) surrenders;

(c) bargains and sales;

(d) customary recovery.

II. Points of Law relating to the Evidence by which the Title abstracted is proved.

What evidence as to deeds can be required. Three points to consider.

We will now assume that you have diligently perused the abstract, and have found that it apparently deduces a good title in the vendor. Your next concern is the evidence of the title as deduced. The first point on which you will naturally wish to satisfy yourself is, Do the deeds, documents, &c., abstracted exist? The second point will be, presuming that they do exist, Are they genuine and valid? These two points will involve the question, What evidence of the existence of various kinds of deeds, documents, &c. are you entitled to require, and what proof that they have been attended with the necessary formalities to make them legally valid and effectual? A third point will be, What evidence are you entitled to demand of matters of fact stated and of proceedings alleged to have been taken in courts of law? Under this head you will have to consider what facts, &c. you are required by law to take for granted, and when direct proof cannot be furnished, how far you will be safe in presuming the existence or non-existence of a state of affairs or of persons as alleged in the abstract.

Requisitions:

So numerous and diversified are the requisitions upon title which the ever-varying circumstances attending titles render it possible for you to make, that it is almost impossible in any general dissertation on requisitions to give you any clear idea of the evidence, &c. you should ask for in any particular case. The circumstances of each special case and the peculiarities of any special title which happen to be before you alone must be the guide as to what requisitions you should send in to the vendor; all we can do is to attempt to lay before you a general view of the nature of the proof which you are entitled to and ought to require in ordinary and in some few special cases. The variety of possible requisitions further makes it all but impossible to classify them; and the best attempt we can make in this direction is to consider the subject under the following heads:—

how considered in this book.

1. How far is the general right to call for strict proof precluded or limited by contract, statute, or the law as laid down by the courts?
2. What evidence of the execution, attestation, perfection, and generally of the validity of deeds, documents, &c., ought to be required by you?
3. What proof of matters of fact are you entitled to?
4. What proof should you demand of proceedings in courts of law which the abstract alleges?
5. What general requisitions should you make, and what general points should you pay attention to, in framing your inquiries and objections to the title?

We shall then, as a sixth division, consider (6) waiver of objections to the title, and then treat of (7) the production of the title deeds.

(1) *How far is the General Right to call for Strict Proof precluded, &c.?*

The contract limits the right to call for evidence.

If you have entered into a contract the terms of which restrict your full right to call for complete and satisfactory evidence of the vendor's title, you cannot persist in demanding proofs which you have contracted not to demand. Thus, if the contract provides that the title shall commence with a specified deed, and it is stipulated that the purchaser shall not make any inquiry,

objection or requisition in respect to the title prior to that deed, he will be bound by the condition, and will not be at liberty to inquire into the prior title or to object to it unless he finds some flaw in it from information received elsewhere, *e. g.*, from an accidental disclosure of the vendor. (*Smith* v. *Robinson;* and see *Nottingham Brick Co.* v. *Butler.*) But, at the same time, a vendor may not have recourse to such a stipulation in order that the purchaser may be precluded from objecting to a defect which he (the vendor) knows to exist in the prior title, and a general condition so worded as to cover a known defect which is not mentioned cannot be enforced. (*Edwards* v. *Wickwar.*) The vendor's only safe course, when there is a defect in his title known to him, is clearly to state its nature, and then provide that no objection shall be made on account thereof.

When the contract is silent, purchaser entitled to good title.

Even where the contract is silent as to the title to be shown, the legal implication that the purchaser is entitled to a good title may be rebutted by evidence that before the execution of the contract he had notice of defects in the vendor's title; but if the contract expressly provides that a good title shall be shown, then the case is otherwise.

How far statutory law limits the right to call for evidence:

In the absence of a contract, or, if there is one, subject to the terms thereof, your strict rights in verifying the abstract are curtailed by statutory enactment.

(i) as to length of title;

(i) The length of title you can now require is cut down from sixty years to forty years by the Vendor and Purchaser Act, 1874.

(ii) as to recitals in deeds;

(ii) By the Vendor and Purchaser Act, 1874, recitals of statements and descriptions of facts, matters, and parties contained in deeds, instruments, acts of parliament, or statutory declarations twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions. It has been held under this act that where a deed twenty years old contained a recital that the vendor was seised in fee, that was a good root of title, and a forty years' title could not be required (*Bolton* v. *London School Board*).

(iii) as to deeds, &c., forming part

(iii) Sect. 3 (3) of the Conveyancing Act, 1881, provides that you shall not require the production of any abstract or copy of

any deed, will, or other document dated or made before the time prescribed by law or stipulated for the commencement of the title, even though the same creates a power subsequently exercised by an instrument appearing in the abstract; and the section prevents you requiring any information or making any requisition, objection, or inquiry with respect to any such deed, &c., or title prior to that time, notwithstanding that such deed, &c., or that prior title is recited, covenanted to be produced or noticed; and further, it requires you to assume, unless the contrary appears, that the recitals contained in the abstracted instruments of any deed, &c. forming part of that prior title are correct and give all the material contents of the recited deed, &c., and that every document so recited was duly executed by all necessary parties and perfected if and as required by fine, recovery, acknowledgment, or otherwise.

of anterior title;

(iv) By the joint effect of the Vendor and Purchaser Act, 1874, s. 2, sub-s. 1, and the Conveyancing Act, 1881, s. 3, sub-s. 1, under a contract to grant, sell, or assign a term of years, derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign is precluded from calling for the title to the freehold or leasehold reversion. This sect. 3, sub-s. 1 of the statute last mentioned does not contain the word "grant," so that it does not apply to the case of the creation by a lessee of an underlease, but only to the assignment of an already existing term with a leasehold reversion. By sect. 13 of the Act of 1881, however, on the grant of a lease to be derived out of a leasehold interest with a leasehold reversion, the intending lessee cannot call for the title to the leasehold reversion.

(iv) as to title on grant or sale of leases and under-leases;

Consequently, if A., the tenant in fee simple of freehold lands, agrees under an open contract to lease the lands to B. for fifty years, B. cannot, owing to the Vendor and Purchaser Act, 1874, call for any title at all, though he takes subject to A.'s title. (See *Patman* v. *Harland*, where a lessee was held bound by a restrictive covenant entered into by his lessor the freeholder, on the ground that, though he had no actual notice of the covenant, yet he had constructive notice of it, since, had he stipulated to look at A.'s title, as he might have done, he would have obtained actual notice. See also *Jones* v. *Watts*, where it was held that in an action for specific performance

Illustrations: (1) Grant of a lease.

of a contract for a lease the court may, in a proper case, order discovery of the lessor's title in spite of sect. 2 of the Vendor and Purchaser Act, 1874.)

(2) Sale of a lease.

Again, if B., in the case supposed, agreed to sell his lease to C., C. could not call for A.'s title, this being the freehold reversion, and so protected by the Vendor and Purchaser Act, 1874; but he could call for the lease itself, and the assignments thereof during the last forty years, though he could not call for or take objection to any mesne assignments between the lease and the first assignment made forty years ago. (See *Williams* v. *Spargo*; *Gossling* v. *Woolf*.)

(3) Grant of an underlease.

Again, if C. agreed to grant an underlease to D. for twenty-five years, while D. could call for the production of the lease originally granted to B. and the assignment thereof to C., he could not call for A.'s title, for this is the freehold reversion, and so protected by the Act of 1874. (See *Gossling* v. *Woolf*.)

(4) Sale of an underlease.

Again, if D. agreed to sell the underlease to E., E. could only call for the production of the underlease made by C. in favour of D. He could not call for the lease in C.'s hands, for this is the leasehold reversion, protected by sect. 3 of the Conveyancing Act, 1881; nor could he call for A.'s title to the freehold. (Vendor and Purchaser Act, 1874, s. 2.)

(5) Grant of a sub sub-lease.

Once more, if E. agreed to grant F. an underlease for ten years, F. could call for the underlease made in favour of D., and the assignment thereof to E., since, as shown above, no provision has been made to take away this right of F.; but he could not call for D.'s title, for this is the leasehold reversion, and protected by sect. 13 of the Conveyancing Act, 1881. (*Gossling* v. *Woolf*.)

(v) as to power under which leasehold was granted;

(v) By sect. 4 of the Conveyancing Act, 1882, where a lease is made under a power contained in a settlement, will, act of parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intending assign, form part of the title, or evidence of the title, to the lease.

(vi) on sale of lease, as to evidence of lease being granted, &c.;

(vi) By the Conveyancing Act, 1881, s. 3 (4), when land sold is held by lease (not including underlease), the purchaser must assume, unless the contrary appears, that the lease was duly granted; and on production of the receipt for the last payment due for rent before completion, must also assume, unless the

contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to completion. And, by sub-s. 5, a similar provision is applied to the sale of an underlease, and the purchaser is required to assume that the underlease and every superior lease were duly granted; and on production of the last receipt for rent due under the underlease he must assume that all the covenants of the underlease, and the rent and covenants of every superior lease, have been paid and duly performed up to completion. These sub-sections, however, will not apply when the rent limited is a peppercorn rent (*Moody and Yates' Contract*), and the receipt produced must be the receipt for the last rent due under the lease which is the subject of the sale. Thus, on the sale of an underlease, the receipt for the last rent due under the superior lease is not evidence within the section with which the purchaser must be satisfied. (See *Higgins and Percival's Contracts.*)

(vii) as to effect of receipt for consideration.

(vii) By the Conveyancing Act, 1881, s. 55, in deeds executed after 1881 a receipt for the consideration in the body of the deed, or indorsed thereon, will, in favour of a purchaser not having notice that the consideration has not in fact been paid, be sufficient evidence of the payment thereof; but there must be a receipt, and not a mere statement that the money was paid. (*Renner* v. *Toller.*) As to receipts in deeds not within this act, it has been held that neither the receipt in the body of the deed, nor the one indorsed, prevented the person who acknowledged the receipt from showing that the money was not paid; but the rule is, that where you find both receipts in the usual form you are not obliged to inquire further, and will be safe in abstaining from requiring evidence of the actual payment of the consideration.

How far the doctrine of presumption limits the purchaser's rights:

In many cases in which the vendor has been unable to supply strict legal proof of the existence of documents, or of their due execution and regularity, or of the existence or non-existence of certain states of facts, or of identity of the parcels, or of persons, &c., courts of law and equity have applied the doctrine of presumption, and required the purchaser to be content with inferior species of proof, or to take for granted that under the peculiar circumstances of the case the state of matters is as the vendor alleges them to be, or has insisted on his presuming a condition of affairs which is favourable to the title. Thus, as to the due

(a) as to existence and

execution of deeds;

existence and due execution of deeds, and generally of all instruments, it has been established as a general principle, that when a right which must have had its origin by virtue of a deed or other instrument has been enjoyed for a considerable length of time, and such deed, &c., cannot be produced, it is nevertheless to be presumed that the right enjoyed was regularly and legally created, unless there is something to negative the presumption. (*Lyon* v. *Reade.*) Thus, in *Hillary* v. *Waller*, a re-conveyance of the legal estate was presumed from trustees in a case where the property had been dealt with for 110 years without reference to the fact that it was outstanding. Again, in *Cooke* v. *Soltau*, payment of a mortgage debt and re-conveyance of the legal estate was presumed, an interval of eighty years having elapsed, and the mortgage not having been mentioned subsequently in the title deeds, and the deeds having been in the vendor's possession for twenty-five years without any claim for interest or principal; and in another case, payment of the purchase-money was presumed after the lapse of forty years. (*Bidlake* v. *Arundel.*) Again, an enfranchisement of copyholds will be presumed where for a great length of time the lord of the manor has not claimed any of his manorial rights. (*Re Jackson and Lidiard's Contracts.*) Another kind of presumption is, that the formalities requisite to a deed have been duly observed; thus, if a deed showing the signature of the person conveying it is produced, the sealing and delivery of it will be presumed; and generally a deed produced from the proper custody will, after thirty years, be required to be admitted without any proof of execution at all. Livery of seisin in the case of a feoffment will be presumed after twelve years' consistent possession thereunder; and there will be a presumption that an instrument duly executed, which is lost, was also duly stamped. (*Hart* v. *Hart.*) But these remarks must be received subject to the reservation that there will be no presumption that prescribed formalities have been complied with, when the law has specially prescribed them on the grounds of general policy. Thus, no presumption will arise as to the due enrolment of a deed specially required by some statute to be enrolled. (*Doe* v. *Waterton.*) In the same way, when strict evidence cannot be adduced as to matters of fact, the vendor will be allowed the benefit of the

(b) as to matters of fact.

doctrine of presumptions. Thus, when the actual seisin of a testator cannot be proved, it will be presumed from facts which show that he acted as owner of the property, *e. g.*, by the production of leases granted by him, &c.; and the difficulty of proving that a man died intestate is met by allowing the fact to be presumed on the production of letters of administration. Again, children born in wedlock are presumed to be the children of the husband, though they may be born the very day after the marriage; and the fact of a marriage being proved, the law presumes that all circumstances existed necessary to make it a valid one. A presumption, too, may arise in favour of the death of a party after the lapse of many years since he was last heard of; but the general rule, that a person who has been unheard of for seven years is to be considered as dead (*Nepean* v. *Doe*), does not seem to apply as between vendor and purchaser, and, to raise the presumption, the particular circumstances of each case must be considered. (See also *Rhodes* v. *Rhodes;* and *Re Corbishley's Trusts.*). In spite of the generally recognised rule that a woman is not, however old, to be considered past child-bearing, presumptions will, as between vendor and purchaser, sometimes be raised that females of an advanced age are past the age of child-bearing. Thus, it has been presumed that a woman of fifty-eight and unmarried was one who was not likely to have any issue. (*Miles* v. *Knight;* and see *Re Widdo.*) But if the woman is married, unless she has been married for a very long time without having had children (*Re Millner*), the court will not treat her as past child-bearing, even though she be more than fifty-four years of age. (See *Croxton* v. *May.*)

(i) Seisin of testator;

(ii) as to birth of children;

(iii) as to death;

(iv) as to woman being past child-bearing.

(2) *What Evidence of the Execution, Attestation, Perfection, and generally of the Validity of the Deeds, &c. abstracted, ought to be required?*

The mere production of the abstracted deeds, &c., however recent they may be, is generally deemed sufficient. In strictness you are entitled to have the due execution proved by the attesting witness, but this is seldom insisted on unless there are suspicious circumstances attending the execution. Deeds thirty years old

As to proof of—
(a) ordinary deeds:
(i) execution;

prove themselves, provided they come from the hands of the proper party, and possession has been held consistently with their provisions. (*Doe* v. *Wooley*.)

(ii) alterations ; This rule applies not only to deeds, but to bonds, receipts, letters, &c. But even in the case of deeds thirty years old, if there are any erasures or interlineations, you are entitled to have the deed fully proved, and the blemishes explained. For if these are in a material portion of the deed they make the deed void, whether made by a party to the deed or a stranger. (*Pigot's Case*.) A mere immaterial alteration, no matter by whom made, however, will not now affect the validity of a deed; and the presumption is that all alterations in deeds were made before execution. When you find erasures or interlineations you should look at the attestation clause to see if they are there noticed, and if they are not you should make inquiries.

(iii) registration ; (*Fitzgerald* v. *Fauconberg*.) When a deed requires registration (as it does when it conveys land in Middlesex or Yorkshire (including Kingston-on-Hull), under the several statutes relating thereto) it should be seen that there is indorsed on the deed a memorandum signed by the deputy registrar, this being evidence of its due registration. If no memorandum is indorsed, then a search must be made in the registry. You are not bound to make this search, and will not be affected by any prior equitable charge, even though it be duly registered, if you have not notice of it; and though you are not bound to search, yet if you do search, you will be deemed to have notice of every document registered during the period through which you extend your search. (*Hodgson* v. *Dean*.)

(iv) stamps ; You should be particular in looking at the stamps on the document to see that they are sufficient in amount. If they are not, you should require the vendor to stamp them properly; and he will be bound to do so at his own expense, unless as to deeds, &c., dated ~~after~~ 16th May, 1888, the expense be thrown on the purchaser by the contract. (See Stamp Act, 1891, *ante*, at p. 55.)

(v) under a power of attorney. If the deed has been executed under a power of attorney, you should see that the power (which must be under seal) is produced to you. It is not usual to ask for evidence of the execution of the power, but as the donor's death revokes it, you should require proof that he was alive at the time it was acted upon. Such proof might consist in the production of a certificate of the

death of the donor, showing him to have died subsequent to the execution of the deed. There will be a presumption that the power was not expressly revoked, unless the contrary be shown. These observations are, however, now subject to the provisions of the Conveyancing Act, 1882, which by sect. 8 provides, that if a power of attorney is given for valuable consideration, and is in the instrument creating it expressed to be irrevocable, then, in favour of a purchaser, the power cannot be revoked either expressly or by the donor's death, marriage, lunacy, unsoundness of mind or bankruptcy, but the donee may act in spite of such occurrences. And further, the purchaser is not to be prejudicially affected by notice of an express revocation, or of facts which would otherwise constitute an implied one. The act only applies to powers created after 1882. Sect. 9 of the same act provides, that if a power of attorney (created after 1882), whether given for valuable consideration or not, is by the instrument creating it expressed to be irrevocable for a fixed time not exceeding a year from the making thereof, then in the favour of a purchaser the power is irrevocable, either expressly or impliedly, during that fixed time, and the donee may do any act under it during that fixed time, notwithstanding anything amounting to revocation; nor will notice of express revocation or of the donor's death, marriage, &c., prejudice the purchaser or the donee. The donee of a power of attorney ought to exercise it not in his own, but in the donor's name; and formerly, if he used his own name only, he, and not his principal, would be bound; but a change is effected in this rule by sect. 46 of the Conveyancing Act, 1881 (and which applies to powers created by instruments dated either before or after the commencement of the act). This section enables the donee to execute the power in his own name if he thinks fit, and the power so executed will be binding on the donor. Again, by sect. 47 of the same act, any person making a payment or doing an act in good faith under a power of attorney is exempted from liability in case the power has been either expressly or impliedly revoked, if he had no notice of such revocation. The section only applies to payments and acts made or done after 1882. (And see sect. 23 of the Trustee Act, 1893.) Provisions (but not of a compulsory

Protecting provisions of the Conveyancing Act as to powers.

Irrevocable powers of attorney.

Mode of exercise of power.

character) are also made by the Conveyancing Act, s. 48, for the deposit in the Supreme Court of powers of attorney.

(vi) lost deed; When a deed is not produced, and its loss is set up as the reason for non-production, you are entitled to proof of its execution, and to evidence of its contents. An attested copy is often received; but you should also insist on having some evidence of the alleged loss, and also that diligent search has been made for it. If you accept a copy as evidence, take care that it is a copy of the original. A copy of a copy is not evidence.

(vii) attested copies;

(viii) enrolled deeds; (ix) recitals in deeds. Of deeds required by law to be enrolled, an examined copy is sufficient evidence of the original; and the recital of a deed is evidence of its existence against all persons executing the deed containing the recital.

(b) Private acts. A private act of parliament which is directed to be noticed as a public one is proved by production of the Queen's printers' copy; and it is unnecessary to show that the copy is in fact one so printed if it purports to be printed either by the Queen's printers or under the superintendence or authority of her Majesty's Stationery Office. (8 & 9 Vict. c. 113, s. 3; and 45 Vict. c. 9.) In other cases the act must be proved by a copy examined with the original.

(c) Awards. Awards under an Inclosure Act are proved by a copy or extract signed (1) by a proper officer of the court, if the enrolment has been made in the High Court; (2) by the clerk of the peace of the county or his deputy, if it has been made with the clerk of the peace.

(d) Copyhold assurances. Copyhold assurances are proved by copies of the court roll signed by the steward; as a rule, evidence of his handwriting is not insisted on.

(e) Leases and releases. As to a lease and release, the recital of a lease for a year in any conveyance executed before the 15th May, 1841, is, by 4 & 5 Vict. c. 21, sufficient evidence of the execution of such lease.

(f) Acknowledged deeds. As to deeds acknowledged by married women prior to the 1st January, 1883, under the Fines and Recoveries Act, you should see that the certificate of acknowledgment has been properly completed, and require proof that it has been duly filed.

With regard to deeds acknowledged since 1882, you should

see that the proper declaration, signed by the commissioner who took the acknowledgment, is duly endorsed.

A fine is proved by the chirograph, as it is called, or by an exemplification under seal of the court, or by a copy examined with the original roll and proved by the oath of the examiner. (g) Chirographs.

A recovery is proved by an exemplification, or by an examined copy. And by 14 Geo. 2, c. 20, after twenty years all recoveries shall be deemed good and valid, if it appears on the face of them that there was a tenant to the writ, and the person joining in them had a sufficient estate and power to suffer the recovery, notwithstanding the deed or deeds for making the tenant to the præcipe may have been lost or do not appear. (h) Recoveries.

Disentailing assurances and other deeds enrolled in Chancery are proved by certificates of enrolment, signed by the proper officer, and such certificates are sufficient *primâ facie* evidence of due enrolment. Copies of all enrolments, stamped with the seal of the Enrolment Office, are as good evidence as the original enrolments. (12 & 13 Vict. c. 109, ss. 18, 19.) (i) Disentailing assurances.

A grant from the crown is proved by an exemplification or certified copy. (j) Crown grants.

A will is proved by the production of the probate, or, if that is lost, by an office copy, and this even though it relates to real estate and has not been proved in solemn form, or declared valid in a contentious manner. (20 & 21 Vict. c. 77, s. 64.) The names of the witnesses to the will should be noted; for should a devisee, through whom the title is derived, be also a witness to the will, the devise to him will be void. (1 Vict. c. 26, s. 15.) The same result will follow if the witness was at the time the wife or husband of the devisee. But a gift to a person by will is not revoked by his or her subsequently, though before the testator's death, marrying one of the attesting witnesses. Here the date of the will, not of the testator's death, is considered. (*Thorpe* v. *Bestwick*.) (k) Wills.

If the will has not been proved, the purchaser of real property devised by the will must be satisfied with production of the will itself and evidence of its due execution in accordance with the Wills Act, 1837; for, as far as regards real property, a will operates as a conveyance without being proved in the Court of Probate.

(l) Enfranchised copyholds.

If copyholds have been enfranchised under the Acts of 1841, 1843, and 1844, the enfranchisement is carried out by deed, and the deed will be proved in the ordinary way. If it has been effected under the Acts of 1852, 1858, and 1887, there will be no deed, but simply an award of the Board of Agriculture (Land Commissioners), which must have been duly confirmed. An enfranchisement may be presumed from long possession. (*Roe* v. *Ireland; In re Lidiard and Jackson's Contracts.*)

(m) Feoffments.

When you come across a feoffment you should see that a memorandum of livery of seisin is indorsed. On finding such a memorandum you are entitled to presume that livery was duly made, unless possession has not gone consistently with the provisions of the deed, in which case the livery must be proved. In the absence of the memorandum the seisin of the feoffee, or else his quiet undisturbed enjoyment for twelve years, will have to be proved.

(n) Bargains and sales.

With regard to a bargain and sale of lands, see first that it is founded on a pecuniary consideration, that no use is limited on the seisin of the bargainee (unless a trust was intended to be created), and that a memorandum of due enrolment is indorsed. You are then entitled to take it for granted that the deed was duly executed. (See *Winscomb* v. *Dunch.*)

(o) Gifts.

If you meet with a voluntary deed of gift you should inquire if the donor was solvent at the time he executed it. If the answer is unsatisfactory, and there is reason to believe that the donor is still indebted, you should refuse to accept the title. If the deed is less than two years old you should also in this case decline to complete, even though the vendor was solvent at the time. For by the bankruptcy laws a voluntary deed (if made by a trader under the Act of 1869, and in all cases under the Act of 1883) is void against the trustee in his bankruptcy if he becomes bankrupt within two years of its date, and if he becomes bankrupt within ten years thereafter it is void, unless proof can be given that he was able to pay all his debts without the aid of the property comprised in the settlement, and that the property passed at once to the trustee of the settlement on its execution. (See hereon *Briggs* v. *Spicer*, where it was held that a voluntary conveyance is a blot on the title for ten years thereafter, and justifies a purchaser who bought without notice of

such a blot in resisting specific performance, this seems still to be so, though it has been since held that if he completes his title will be good as against the trustee. (*Re Brall.*)) And such a conveyance can be impeached by or on behalf of creditors at any distance of time, on the ground that the voluntary grantor was insolvent at the time of executing the deed under 13 Eliz. c. 5. (See *The Three Towns Building Co.* v. *Maddever.*) Formerly, a voluntary deed could also be defeated by a subsequent sale for value by the donor, under 27 Eliz. c. 4, unless the donee was a charity, when that statute did not apply in the absence of actual fraud (*Ramsay* v. *Gilchrist*); but now a voluntary conveyance made *bonâ fide* cannot be defeated by a subsequent sale to a purchaser owing to the provisions of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21).

(3) *As to Evidence of Matters of Fact.*

Matters of fact may be positive or negative.

This subject may be roughly divided into two branches—evidence of positive facts, or proof that a certain state of affairs exists, and evidence of negative facts, or proof that a certain state of affairs does not exist. Under the first head we propose to make a few remarks on the evidence required to verify identity of the parcels, of seisin, of births, deaths and marriages, of pedigree, of redemption of the land tax, of payment of succession duty, of the payment of the purchase-money, of peculiar customs in copyhold manors. Under the second head we propose to consider briefly what evidence you should ask for as to intestacy, freedom from tithes, that an estate tail has not been barred, failure of issue, the non-existence of easements.

(1) As to positive facts—(a) Identity.

Sometimes you will find that the description of the parcels has been altered, or that they are described in one way in one deed, and in another way in another deed. In such a case you should require to be satisfied that the parcels as described in the deeds are identical with those contracted to be sold; evidence of this may be given by means of old plans, leases, parish assessments, declarations of old persons as to the identity of the property, and as to the uninterrupted enjoyment of it by the vendor and his ancestors, or the person from whom he bought it, &c.

(b) Seisin.

Seisin may be proved by circumstances showing that the person whose seisin has to be proved dealt with the land in the character of a man who had taken legal possession of it; thus the production of leases granted by him, which have been followed by possession or the payment of rent (*Clarkson* v. *Woodhouse*), the assessments to the poor rates, land tax, and other evidence of this nature, will be deemed sufficient.

(c) Births, deaths and marriages.

Births, deaths and marriages may be proved by recitals in deeds, &c., twenty years old under the Vendor and Purchaser Act, 1874, or by certificates obtained from the proper registers, or certified extracts from non-parochial registers deposited with the Registrar-General. (3 & 4 Vict. c. 92, s. 9.) When certificates cannot be obtained, declarations by members of the family, entries in family bibles and other books, if made by a member of the family, &c., are receivable as evidence. This evidence can and should also be corroborated by statutory declarations of members of the family or relations. The reason for requiring the entries in books, &c., and declarations to be made by a member of the family, is that the law presumes that not only are they the persons most likely to know the truth, but at the same time they are the least subject to the temptation to exceed or fall short of it. (*Whitelocke* v. *Baker*.) But as between vendor and purchaser, declarations of persons not actually members of the family, but well acquainted with them, may be taken as proof.

It would seem, from the case of *Haines* v. *Guthrie*, that though such evidence is admissible to establish the descent of one person from another, it is not admissible to prove that a person was born, married, or died on any particular date. It must be strictly confined to pedigree.

(d) Pedigree.

The proof of a pedigree will, of course, include the births, marriages, and deaths of the persons who, from the pedigree, appear to have been born, married, or died. It will further involve the negative proof in some instances that a person died without having been married or without having had issue. The first thing to be proved is that the person from whom the descent is traced was a "purchaser" within the legal meaning of the word. Where the descent took place before 1834, the seisin of the ancestor will have to be established, if such ancestor took as an heir and was not himself the purchaser. Next, the

death and intestacy of the ancestor must be shown; then the relationship of the person alleged to be the heir must be put in proof by declarations and other such secondary evidence. As to failure of issue, it seems that there is a presumption that a person shown to be dead died unmarried and without issue. (*Doe* v. *Deakin.*) Then the legitimacy of an heir may be required to be established; we have seen that there is a presumption that a child born in wedlock is legitimate, and the presumption may be strengthened by certificates of birth, declarations, &c. Sometimes the register of a baptism states the fact of illegitimacy; such a statement, however, does not seem entitled to much weight. Nor are the declarations of the parents themselves after the birth evidence that can be relied on to prove legitimacy. As a rule, strict proof of a pedigree is not frequently insisted on, from the mere difficulty that exists of procuring completely satisfactory evidence.

(e) Redemption of land tax.

Redemption of the land tax is proved by the production of the certificate of the commissioners, with the receipt of the cashier of the Bank of England, and memorandum of registration, or a copy of the register. (42 Geo. 3, c. 116, s. 38; *Buchanan* v. *Poppleton.*)

(f) Payment of succession duty:

It will be advisable, in the first place, to remind you in a few words in what cases a liability to pay succession duty attaches. The effect of the Succession Duty Act, 1853 (16 & 17 Vict. c. 51), as amended by the Customs Act, 1888 (51 Vict. c. 8), and the Customs Act, 1889 (52 Vict. c. 7), is as follows:—

(i) who is a successor;

Whenever anyone beneficially takes property, or the income thereof, by the death of a person dying after the 19th of May, 1853, whether by the effect of some instrument or by the devolution of law, he becomes a "successor," and is liable to pay succession duty.

(ii) as to joint tenants;

If a joint tenant dies after the date named, the surviving joint tenant must pay duty on the beneficial interest accruing to him by the survivorship.

(iii) as to powers of appointment;

If A. has a general power of appointment under a disposition of property, taking effect on the death of a person dying after that date, and he exercises that power, he (A.) must pay duty; if the power is a limited or special one, the person to whom the property is appointed must pay the duty.

(iv) as to charges determinable by death;

Where the property is subject to a charge, estate, or interest, determinable by the death of any person, or at any period ascertainable only by reference to death, the increase of benefit accruing to any person by the extinction of the charge makes him a successor, and thus liable to pay duty.

(v) as to reservations for grantor's benefit;

In any disposition of property which is not a sale, or which does not confer an interest expectant on death on the person in whose favour it is made, but which is accompanied by some reservation or assurance of, or contract for, any benefit to the grantor or any other person for life, or for any period ascertainable only by reference to death, the person whose interest is rendered more valuable by the determination of such benefit will have to pay duty on the increased value of his interest in the property, the succession here being deemed equal in annual value to the yearly value of the benefit so reserved.

(vi) as to dispositions dependent on death;

Dispositions to take effect at a period depending on death, or made for evading duty, will confer successions, and persons taking under such dispositions will have to pay duty. If a person makes a disposition of property in such a way that he will acquire an interest in it again on the death of any person dying after 19th May, 1853, he will not have to pay duty as a successor, except in the case where, at the time of the disposition, he is entitled to the property expectant by the death of some person dying after the date specified in the act, and that person has died during the continuance of the disposition. The object of this is to prevent persons evading a liability to pay duty, by settling the property during the life of the predecessor in such a way that it shall seem to come not as a consequence of the death of the predecessor, but as a consequence of the death of some person which gives them back the property by virtue of a disposition made by themselves. (See *Braybrooke* v. *Attorney-General.*)

(vii) as to successions falling into possession;

Where a succession, before falling into possession, has become vested, by alienation, or any title not conferring a new succession, in any other person, that is to say, where there is a *transferred* succession, the duty is payable just the same as if no such alienation had been made; such, also, will be the case where the title to any succession has been accelerated by the extinction or surrender of any prior interest.

But where there has been a *transmitted* succession, that is, where the successor before becoming entitled in possession has died, and the property has thus passed to some one, the transmittee—the new successor—if the property the subject of the succession is real property (including in this expression leaseholds), will pay his own duty as successor. If the property the subject of the transmitted succession consists of settled chattels (which bear succession and not legacy duty), the Crown can claim the higher rate of duty—that is to say, if the original successor would have paid at the rate of $1\frac{1}{2}$ per cent. on the value of his succession, and the transmittee would have to pay $11\frac{1}{2}$ per cent. on the value, the Crown could claim the latter rate of duty, and so *vice versâ*.

(viii) gifts to charities;

Gifts by way of a succession to charities were liable to a duty of 10 per cent.; but now, by the Customs Act, 1888, the duty is at the rate of $11\frac{1}{2}$ per cent.

(ix) exemptions;

Sect. 18 of the Act makes certain exemptions where the whole successions from the same predecessor are not of the value of 100*l.*; and in some other cases, *e. g.*, where the successor is a husband or wife of the predecessor. Formerly, where the whole succession was not of the value of 20*l.*, no duty was payable, but this exception has been abolished by the Customs Act, 1888, and duty is now payable in such a case.

(x) duty when payable;

The duty becomes due on the successor becoming entitled in possession. It may be paid either (1) in a lump sum; or (2) it may be extended over four and a-half years by being paid by eight equal half-yearly instalments, the first being paid at the end of the year from the time of the successor becoming entitled in possession; or (3) it may be extended over four years by being paid by two equal moieties, the first moiety to be paid by four yearly instalments, the first instalment to be paid at the expiration of twelve months from the successor becoming entitled in possession, and the three following instalments at yearly intervals, the second moiety to be paid together with the last instalment of the first moiety, or, if the successor so desires, the second moiety may be paid by four further yearly instalments, thus extending the payment over eight years, but in this event any money remaining owing after the second moiety has become due, that is, after the end of the fourth year, bears

interest at the rate of 4*l.* per cent. This last method of payment is authorized by the Customs Act, 1888.

(xi) how it should be paid.

Where the successor's interest consists of an estate in fee simple, or other estate which he can dispose of by his will, it is desirable that he pay the duty in a lump sum, as a discount will be allowed him, and he gains no advantage from the payment by instalments, since, if he dies before all the instalments are paid, his estate will be responsible to the Crown for the unpaid instalments. But if his interest is not of such a character that he can make a disposition thereof by his will, *e. g.*, if it be a life estate or an estate tail which the successor cannot or does not intend to bar, it is advisable to pay the duty either by the eight half-yearly instalments allowed by the Act of 1853, or the two moieties allowed by the Act of 1888; since if, the duty being paid by the eight half-yearly instalments, the successor dies before all the instalments are payable, the unpaid instalments lapse; and if, the duty being paid by the two moieties, the successor dies before the second moiety becomes due, that is, before the end of the fourth year of his becoming entitled in possession, so much of the unpaid duty will lapse as would have lapsed had the duty been paid by the eight half-yearly instalments, that being the effect of the Act of 1853 as read with the Act of 1888.

(xii) successor's interest, how valued;

The successor's interest is to be considered to be of the value of an annuity equal to the annual value of the property during his life, or any less period for which he may be entitled thereto; the annuity is to be calculated according to certain tables annexed to the act.

(xiii) estate duty under the Customs Act, 1889;

By the Customs Act, 1889, an extra duty of one per cent. on the capital value of real property (not including leaseholds) comprised in a succession is now cast upon a successor in every case where the total value of the property (real and personal) to which he becomes entitled on the death of another dying after 31st of May, 1889, exceeds 10,000*l.* This one per cent. duty is on the total value of the *real* property (not including leaseholds) succeeded to, and is paid on the capital value, and the duty is styled "estate duty," and it is payable in the same way as the succession duty itself. (See *ante*, p. 119.)

(xiv) duty is a charge on the property;

The duty imposed, including the new "estate duty," is a first charge on the interest of the successor, and of all persons claim-

ing in his right, and also on the interest of the successor while the property remains in the ownership or control of the successor or his trustee, or of the husband of any wife who shall be successor. It will further have priority over all charges and interests created by the successor, but will not affect or charge any of his real property other than that comprised in the succession.

(xv) when inquiry as to payment of duty should be made.

You ought to make an inquiry as to the payment of succession duty in every case in which you find that a person has acquired the property by the death of some person dying after the 19th May, 1853. As to the evidence you may ask for that the duty has been paid, sect. 52 of the act provides that the receipt for the duty and a certificate of payment shall exonerate a *bonâ fide* purchaser for valuable consideration, and without notice, from such duty, notwithstanding any suppression or misstatement in the account.

(xvi) When barred.

By the Customs Act, 1889, special provisions have been made in favour of purchasers, with regard to succession duty, requiring the Crown to prove its claim within twelve years in some cases and six years in others. (See sect. 12.)

(g) Payment of purchase-money.

Having now discussed succession duty, we must draw your attention next to the proof of the payment of the purchase-money. Payment of purchase-money is proved by the receipts for the same contained in the body of the deed and indorsed thereon. If the deed is dated before 1882, you should see that both these receipts are mentioned, and you should bear in mind the case of *Kennedy* v. *Green*, where the unusual position of the receipt, on the back of a deed, was, with other circumstances, considered as important, as showing that a purchaser had not exercised due diligence, which would have led to the discovery of a fraud. The absence of any receipt is notice, in equity, to the purchaser that it has not been paid, and in such a case positive proof of payment should be required. As to deeds executed after 1881, the Conveyancing Act provides (sect. 55), that either the receipt in the body of the deed, or that indorsed thereon, shall, in favour of a subsequent purchaser, without notice that the money has not been paid, be sufficient evidence of the payment of such money.

(h) Customs

When the land the subject of the abstract is copyhold,

in copyhold tenures.

evidence should be asked for as to the existence and nature of any peculiar customs which may be incident to it. In practice, the certificate of the steward of the manor is received as evidence, but strict evidence would consist of presentment of the homage and proof from the rolls that any particular custom had been followed in most cases. Evidence of reputation is also admissible.

(i) Acknowledgments of married women.

The acknowledgment of a deed by a married woman, when such acknowledgment is necessary under the Fines and Recoveries Act, is proved by a copy of the certificate of acknowledgment filed in court, signed by the proper officer. (3 & 4 Will. 4, c. 74, s. 88.) And it must also be seen that a memorandum of the acknowledgment is indorsed on the deed, that it is in the form given in the statute, and that it is signed by the commissioners taking the acknowledgment. But as to deeds requiring acknowledgment executed since 1882, the production of the certificate is no longer necessary, but the indorsed memorandum alone is conclusive evidence that the proper forms have been gone through. We shall speak later on as to the mode in which these acknowledgments are to be taken under the Conveyancing Act, 1882.

(j) Attestation of instruments.

Certain deeds and instruments are required to be executed in certain ways and attested with certain formalities. In these cases you should see that the statutory requirements have been duly complied with. Thus, bills of sale must be attested with certain formalities; again, conveyances within the Mortmain Acts require two witnesses and other formalities; appointments of guardians to infants by their fathers require two witnesses (12 Car. 2, c. 24, s. 8); memorials for registration of deeds relating to property in Middlesex and Yorkshire require to be witnessed, and wills of real property, executed before 1837, require three, and if executed since then, two, witnesses.

(k) Licences.

When you find a provision in a head lease that no assignment or underlease shall be made without the lessor's licence, and your title comes through an assignment or underlease, you must have evidence of the giving of such licence. The production of the last receipt for rent will now be sufficient evidence of this. (See sect. 3, sub-ss. 4 and 5, of the Conveyancing Act, 1881, and *ante*, pp. 35, 105, 106.)

(2) Evidence

The production of letters of administration to a deceased

person's estate are generally accepted as evidence that he died intestate. Searches for a will may also be made in the probate registries of districts where it is likely that a will may be deposited. (a) of negative facts: (a) of intestacy;

If the land is alleged to be free from tithes, the award of the commissioners to that effect should be produced, for these commissioners have power to make a binding decision as to the existence of any modes of composition or claim of exemption from tithes. (See 6 & 7 Will. 4, c. 71, s. 44.) (b) of freedom from tithes;

It is sometimes necessary to require proof of the barring of an estate tail: in cases, for instance, where the title is traced through a person who took as heir to a tenant in tail. The fact that the ancestor did not bar the entail should be ascertained by a search in the Central Office of the High Court for a disentailing deed. (c) of the barring of an estate tail;

In proving pedigrees it is sometimes necessary to ask for evidence that some person or other had no issue. We have already mentioned that it is presumed that a person who is shown to be dead, died unmarried and without issue. This presumption may be corroborated by a statutory declaration as to the fact. (d) of failure of issue;

A general inquiry should be made as to whether there are any rights of way or other easements affecting the property sold. Strict proof that there are none cannot, of course, be insisted on, for the presumption is, that they do not exist, and the vendor cannot be expected to prove a negative. Easements may arise by a grant, either express or implied, or by prescription, or in some cases by necessary implication, as where the easement is a way of necessity without which the property cannot be enjoyed. (*Corporation of London* v. *Riggs;* but see *Wilkes* v. *Greenaway.*) As to the acquirement of easements by prescription, you should refer to the Prescription Act (2 & 3 Will. 4, c. 71), an outline of which has been already given. (See *ante*, p. 96.) (e) of easements.

(4) *As to the Proof of Proceedings in Courts of Law.*

Proceedings affecting the estate may have taken place in Chancery, in bankruptcy, or in lunacy. Proceedings in the old courts of law and equity are proved by exemplifications under (i) In the High Court, how proved.

the seal of the court, or authenticated by the signature of the judge if the court has no seal. Proof of the seal or signature is rendered unnecessary by 8 & 9 Vict. c. 43. By the Rules of the Supreme Court, 1883, office copies of all pleadings, records, and documents filed in the High Court are admissible in evidence in all causes and matters, and between all parties and persons, to the same extent as the original would be admissible; proceedings in bankruptcy are proved by copies certified in the manner directed by the various acts.

(ii) In bankruptcy.

The Bankruptcy Act of 1883 provides that any petition or copy of a petition, any order or certificate or copy thereof, any instrument or copy of an instrument, affidavit, or document made or used in the course of any bankruptcy proceedings or other proceedings had under that act, shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, or purports to be signed by any judge thereof, or is certified as a true copy by any registrar thereof, be receivable in evidence in all legal proceedings whatever. (Sect. 134.)

The appointment of a trustee in bankruptcy is, under the provisions of the Bankruptcy Act, 1883, conclusively proved by the certificate thereof, signed by the Board of Trade (sect. 138); and all documents purporting to be orders or certificates made or issued by the Board, and to be sealed by the Board, are to be received in evidence, and deemed to be such orders or certificates without further proof, unless the contrary is shown. (Sect. 140.)

(iii) In lunacy.

Proceedings in lunacy are now proved by an office copy of the whole of an order, or report confirmed by fiat, purporting to be signed by a Master, and sealed or stamped with the seal of the Master's Office. Every office copy of a certificate in lunacy is evidence of the order, report, or certificate of which it purports to be a copy, without further proof thereof. (Lunacy Act, 1890, 53 Vict. c. 5, s. 144.)

(5) *General Requisitions and Observations on Title.*

Your requisitions must, of course, be framed with a regard to the nature of the particular title before you, and also to the restrictions under which you are placed by the contract, or by

the provisions of recent statutes. It is a bad practice to make unnecessary requisitions for the mere purpose of swelling the volume of the document, and besides, it might possibly result in your having to bear out of your own pocket any extra costs which you may have occasioned by asking needless questions and raising frivolous objections. There are, however, some general requisitions which will be applicable to most titles. A few of these we will now proceed to set out, premising that they are not to be used indiscriminately, but only when they are properly applicable.

(i) As to dower.

As a rule, you should ask if any person who has been seised in fee simple or fee tail of the land, was married before 1834, and if in that case he left a widow surviving him, or if he is still living, if his wife is yet *in esse*. If the widow is still alive you must require her to join in the conveyance, and release her dower; and if the vendor has a wife still living to whom he was married before 1834, she must join in the conveyance to release her right. And though dower will seldom attach under the law as altered by the Dower Act, 1833, yet if you find that an owner of the estate has died intestate, you should generally ask if he left a widow to whom he was married after 1833, and if he did, you should require proof that she is dead, or that the right to dower was barred by a declaration in a deed or will made by him. If such a declaration is contained in a deed, it is not necessary, to give the declaration effect, that the purchaser should have executed the deed. (*Fairly* v. *Tuck.*) But such a declaration in a deed, executed before 1834, will not bar the dower of a wife of the person making the declaration if he was married to her after the 1st January, 1834. (*Fry* v. *Noble.*)

(ii) As to annuities.

Properly speaking, the abstract should mention whether there are any annuities affecting the property; but in practice they are seldom alluded to. The existence of many of them can, of course, be ascertained by searching; for, before annuities for life or years determinable with a life will affect lands in the hands of a purchaser, they are required, by 18 & 19 Vict. c. 15, to be registered. But annuities created by marriage settlement or will do not fall within this act, and so need no registration; it may therefore be advisable to ask generally if there are any

annuities affecting the property sold, although it would seem that the vendor might refuse to answer the requisition, in reliance on *Ford* v. *Hill*. (See *post*, p. 130.) And when you find that an annuity or rent-charge has been granted, and the land charged with its payment, you should ask if the annuitant is alive, and require the production of receipts to show that the annuity has been duly paid. If any annuitant is living, he should be required to join in the conveyance and release the estate; if alleged to be dead, proof of his death should be required. Satisfaction of any registered annuity, and also of any registered judgment, *lis pendens*, decree, order, rule, rent-charge, or writ of execution, may be entered up at the central office, and certificates of such entry issued. (23 & 24 Vict. c. 115, s. 2.)

(iii) As to legacies.

When there are any legacies or other sums charged on the land, you should require proof of the payment of them by the production of the receipts signed by the legatee, &c.; and this should be insisted on, even though more than twelve years have elapsed since they became payable, because, although after that time they will as a rule be barred by the Statute of Limitations (see 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57), yet they might still be subsisting by reason of the legatee, &c., being under some disability, such as infancy, and so entitled to an extension of time, or by some acknowledgment given by the executor. (*Shields* v. *Rice*; *Cooke* v. *Saltau*.) You should see that the receipt for the legacy is duly stamped, showing the payment of the legacy duties; for, by sect. 28 of the Legacy Duty Act (36 Geo. 3, c. 52), no written receipt or discharge for any legacy, on which duty is payable, shall be received in evidence unless stamped as required by the act, and no evidence whatsoever shall be given of the payment of the legacy without the production of such receipt duly stamped, unless the actual payment of the duty shall first be given in evidence; such payment may be proved by a copy of the entry in the books of the Stamp Commissioners showing the payment of the duty. After thirty years you will be entitled to make a presumption that the legacy, &c., has been discharged, for this is the outside period allowed for bringing an action to recover a legacy, whether there is disability or not, and even though the legacy is charged

on the land so as to create an express trust in favour of the legatee. (37 & 38 Vict. c. 57, s. 10.)

(iv) as to satisfied terms—

As we shall point out when we come to discuss strict settlements, the purpose of creating long terms of years is generally to secure the payment of pin-money or jointure, or to enable portions to be raised by a mortgage of the term. Now, when the purposes for which the term was created are fulfilled, and there remains no useful purpose beneficial to the owner of the term and consistent with the trust on which the term is directed to be held, the term is said to be "satisfied." It was the practice for the purchaser of lands, when a satisfied term was in existence affecting that land, to have it assigned to a trustee for him in trust to attend the inheritance. The effect of this was that the purchaser was protected from any incumbrance that had been created since the commencement of the term, provided he was ignorant of the existence of that incumbrance at the time he purchased (for he could not use the term to protect himself if he had notice of the incumbrance at the time of his purchase, except in the case of a married woman's dower, and against that the assignment of the term would protect him, even though he had notice of it). But by 8 & 9 Vict. c. 112, which was passed with the object of rendering the assignment of satisfied terms unnecessary, it was enacted that every satisfied term of years which, either by express declaration or by construction of law, should, on the 31st December, 1845, be attendant on the reversion or inheritance of any lands, should on that day absolutely cease and determine; but that if it was attendant by express declaration, it should, in spite of its ceasing, afford to every person the same protection against incumbrances as it would have done had it continued to exist, but had not been assigned or dealt with after the 31st December, 1845, and should for the purpose of such protection be considered in every court to be a subsisting term. Further, the act provided that every term of years subsisting, or thereafter to be created, becoming satisfied after the above date, and becoming attendant on the inheritance, either by express declaration or by construction of law after that date, should immediately cease.

(a) old law;

(b) present law.

Practice under.

It will not, then, be now necessary to obtain the assignment to your client of a term which has been satisfied, provided it is

one which comes within the act; and it will be necessary for you to see that the term does come within the act, that is to say, that every purpose for which the term was created has been fulfilled and satisfied. You should also inquire in whom the term was vested at the time it became subject to the operation of the act. (See *Lyle* v. *Earl of Yarborough*, and *Shaw* v. *Johnson*.) Generally you should see that the document creating the term is abstracted together with the mesne assignments; and if the term is one which has become merged under the act, the title to it should be traced down to the time of the merger.

(v) As to outstanding legal estates.

When you find that the legal estate is outstanding in some trustee or other person, you should require the vendor to get it in. This he will be bound to do at his own expense, in the absence of stipulation, for this is one of the few expenses which is not thrown on the purchaser by the Conveyancing Act, 1881, s. 3. If the trustee in whom the legal estate is, died before August 7th, 1874, when the Vendor and Purchaser Act came into operation, the legal estate will have descended to his heir or devisee, and a reconveyance must be obtained from him. If the trustee died after the above-mentioned date, and before the 1st January, 1882, by sect. 4 of the Vendor and Purchaser Act, 1874, and sect. 48 of the Land Transfer Act, 1875, his legal personal representative must (if at least he is a bare trustee), execute the conveyance if he died intestate; but if he died having devised the term to a third person, then the devisee would be the necessary party to convey; if he died after the 31st December, 1881, then by sect. 30 of the Conveyancing Act, 1881, the legal estate will (except in the case of copyholds: sect. 45, Copyhold Act, 1887) vest, notwithstanding any testamentary disposition, in his personal representative, who will be the person to reconvey. This enactment makes it a much simpler matter than it formerly was to obtain a conveyance of the legal estate; for when it was still possible for it to vest in the trustee's heir or in a devisee, it often happened that that heir or devisee was under some disability, as infancy or lunacy, and it then became necessary in these cases to have recourse to an application to the court under the Trustee Acts, 1850 and 1852 (13 & 14 Vict. c. 60, and 15 & 16 Vict. c. 55), now repealed, but the provisions of which are re-enacted in the

Trustee Act, 1893, Part III. (56 & 57 Vict. c. 53), to make a vesting order transferring the estate. If the property is copyhold, the legal estate will be in the heir or devisee, and he must execute the required conveyance, as sect. 30 of the Conveyancing Act, 1881, though it did apply to copyholds (see *Re Hughes*, and *Heslop* v. *Richmond*), no longer does so, owing to sect. 45 of the Copyhold Act, 1887 (and see *Re Mills' Trusts*). And in this case, if the heir or devisee is under disability, advantage must be taken of the Trustee Act, 1893, and an application made to the Court for a vesting order. A conveyance of the legal estate will in some cases be presumed, as we have already pointed out.

(vi) As to surrendered leases.

When the property consists of a renewable lease, and the abstract shows it to have been surrendered and renewed, you should require production of the surrendered lease, and to be satisfied that no beneficial interest existed in it which is outstanding, and which would attach to the new lease, and that the surrenderor was the legal as well as the equitable owner of the surrendered lease. For the reference to the old lease amounts to implied notice of its contents; and when a trustee renews a lease, it enures to the advantage of all who were beneficially interested in the old lease, so that you must be careful to see that there are no outstanding persons who might be entitled as beneficiaries to claims upon the renewed lease. (*Coppin* v. *Fernyhough*; *Hodgkinson* v. *Cooper*, and see *Wallis* v. *Hands*.)

(vii) As to marriage articles and settlements.

When you find a marriage settlement which purports to be made in pursuance of articles entered into before the marriage, you should require an abstract of those articles to be furnished to you; for in such a case it will be incumbent on you to see that the terms of the articles are carried out by the settlement itself. (See *Legg* v. *Goldwire*.)

If you have any suspicions, it is advisable to ask if any settlement affecting the estate has been executed and which has not been noticed in the abstract.

(viii) As to charges for improvement loans.

Inquiries should be made in proper cases if there are any improvement loans affecting the property. For by 8 & 9 Vict. c. 56, certain limited owners of land may, with the leave of the court, make certain specified improvements on their lands, and

charge the money expended on the inheritance; and by the Public Money Drainage Acts owners of land can obtain advances from government for drainage works, and the advances made will become a rent-charge on the land for a term of twenty-two years. By the Improvement of Land Act, 1864, money may be raised for improving the land by way of a rent-charge; and by the Limited Owners' Residence Act, 1871, the erection of a mansion-house, and the repair or improvement of an existing one, are to be deemed improvements within the last-mentioned act. And now, money may be raised for any improvement for which capital money may, under the S. L. Act, 1882, be applied. Statutory land charges of this character created after 31st December, 1888, and the first assignment *inter vivos* of all such charges created before 1st January, 1889, must now be registered in the Land Registry in Lincoln's Inn Fields, under the Lands Charges Registration and Searches Act, 1888, and as their existence or non-existence can be ascertained by searching, an inquiry as to them will probably in practice not be necessary, and, if made, will not be answered, owing to the decision, *Re Ford and Hill*, *infra*.

(ix) As to incumbrances generally.

At one time it was the practice to conclude the requisitions with a general inquiry if there were any judgments, crown debts, annuities, *lites pendentes*, lease, mortgage, writ of execution, bankruptcy, or insolvency, or deed or document, or any charge or incumbrance affecting the property sold and known to the vendor or his solicitor, and not disclosed by the abstract. But, in *Re Ford and Hill*, it was held that this was a requisition that the vendor and his solicitor were not obliged to answer. Such a requisition is a "searching inquiry," and moreover, as it is a misdemeanour to suppress any incumbrance on the title, the answer to such a requisition might tend to criminate, and the general rule is, that no witness is bound to answer questions when the replies to them might render him liable to be proceeded against criminally.

You must not, however, rely altogether on the abstract of title furnished to you by the vendor, and the information you can glean from your own investigation of the deeds, &c., produced to you on your attending to verify it; you may be able in many cases to satisfy yourself, by going this far and no farther, that he has a good title, but you cannot be certain that

there are no incumbrances on the estate. True, the vendor is bound under penal consequences not to suppress any fact or impediment material to the title; but he is not required to state on the face of the abstract such incumbrances as you could, by the exercise of reasonable care, and by making such inquiries as any ordinarily cautious man would make, discover. And if you have positive notice that there exists some specified incumbrance on the title, you cannot treat it with impunity and disregard it in hopes not to be affected by it merely because the vendor has not given you notice of it. It will, then, be convenient for us to say a few words on the subject of notice as it affects a purchaser, and mention a few of the inquiries he ought to make from other persons than the vendor. The maxim "*caveat emptor*" applies to the sale of real as well as to the sale of personal property, and a purchaser must always be on his guard and not expect to be delivered by the courts of law from the consequences of his own neglect or rashness.

As to notice generally:—

The rule is, that when a purchaser has notice of an incumbrance he will take the property subject to it, although the existence of this incumbrance was not pointed out to him by the vendor.

Notice is of two kinds, actual and constructive. As to actual notice it is sufficient to say (1) it must be given by a person interested in the property and in the course of the negotiations (see *Barnhart* v. *Greenshields*); (2) it must be given to a person authorized to receive it; and notice to the solicitors of trustees is not necessarily notice to the trustees, there being no such relation between a man and his solicitor to make the latter his agent for all purposes (*Saffron Walden Building Co.* v. *Rayner*); but, of course, if solicitors are employed by trustees to investigate a title, and in doing so they obtain notice of some incumbrance or defect, this will be notice to their clients, the trustees, under sect. 3 of the Conveyancing Act, 1882; and (3) the notice must be a clear and distinct one; for mere vague reports from persons not interested in the property will not affect a purchaser.

(a) actual notice;

As to what amounts to constructive notice, this must depend on the particular circumstances of each case, for the term has never received any precise definition. In *Jones* v. *Smith*,

(b) constructive notice.

Wigram, V.-C., divided cases on constructive notice into two classes:

(a) Cases in which the party charged has had actual notice that the property in dispute was in fact charged, incumbered, or in some way affected, and the court has thereupon bound him with constructive notice of facts and instruments, to a knowledge of which he would have been led by an inquiry after the charge, &c.; and

(b) Cases in which he has designedly abstained from inquiring for the very purpose of avoiding notice.

How far absence of caution amounts to constructive notice.

But the Vice-Chancellor said, that mere absence of caution, as distinguished from fraudulent and wilful blindness, did not amount to constructive notice, a statement which has not been altogether judicially approved, but which seems to be supported by the recent case, *Bailey* v. *Barnes*, *post*, p. 135. And the mere absence of the title deeds will not affect the purchaser without notice of an incumbrance on the land if he has made *bonâ fide* inquiry for the deeds and been furnished with a sufficient excuse for their absence. Thus, in the case of *Allen* v. *Knight*, it was held that an allegation that the deeds had been made into jelly covers was a sufficient excuse for their absence, and that, having received such a reply in answer to his inquiries, a purchaser could not be fixed with the consequences of constructive notice that the estate was incumbered.

There is also another kind of constructive notice: and it has been settled that notice to an agent, attorney or counsel for a purchaser amounts to constructive notice to the purchaser himself, provided that such agents, &c., obtained the notice in the same transaction as that in which notice to the purchaser is alleged. And it has been further laid down that where one transaction is closely followed and connected with another, then the two transactions are practically one, and notice received in the first transaction will be constructive notice to the client in the second (*Fuller* v. *Bennett*; *Hargraves* v. *Rothwell*); but this is reversed by the Conveyancing Act, 1882, by which notice to a solicitor is only notice to a client if received in the *same transaction*. (See *Re Cousins*.)

Some cases on constructive notice.

In illustration of the doctrine of constructive notice, you should refer to the following cases, a brief abstract of which we give here. If the title deeds are in the hands of some person

other than the vendor, or than the person in whose hands you would naturally expect to find them, this amounts to notice that such person has some charge on the estate. In such cases you should make inquiries as to the reason for the unusual possession of the deeds, or you may be saddled with consequences which a seasonable inquiry would have enabled you to have avoided. (See *Mayfield* v. *Burton*, and *Spencer* v. *Clark*.) Again, notice of any one particular deed is notice of all deeds, facts, &c., which an inspection of that deed would have disclosed. (*Coppin* v. *Fernyhough*.) And notice of a lease is notice of all the covenants and provisoes contained in that lease. (*Hall* v. *Smith*.) Thus, if you have notice of a lease which contains a restrictive covenant enforceable against the land (*L. & S. W. Rail. Co.* v. *Gomm*), and are not aware of that covenant by reason of your having abstained from inspecting the lease, you will nevertheless be bound by the covenant. (*Wilson* v. *Hart*.) And another decision shows that this would be the case even if the vendor assured you that the lease contained no restrictive conditions, though you would have a remedy against the vendor in damages; and, moreover, that the Vendor and Purchaser Act (as amplified by the Conveyancing Act), which prevents you requiring a lessor's title to be shown to you, does not affect the point of constructive notice in such a case; for the effect of those acts is merely to put the lessee in the same position as he would have been in if before them he had contracted not to inquire into the lessor's title. (*Patman* v. *Harland*.)

The general rule to be deduced.

The general rule may be qualified under some circumstances; thus, where you get notice of some deed which need not necessarily affect the land, a marriage settlement, for instance (for that may relate wholly to other property), and are also told that it does not affect the land, here you are justified in neglecting to look at the settlement, and will not be deemed to have constructive notice of its contents. (*Carter* v. *Wilson*.) And if the purchase-money is small, and the title is complicated, this may be an excuse for not being so strict in your inquiries, and you may be able to avoid the imputation of constructive notice much more easily. (See *Kettlewell* v. *Watson*.) Again, notice of an incumbrance which a solicitor possesses is not always equivalent to notice to the client, for it must be

notice which has come to the solicitor or agent as such, and in the same transaction as that in which the question arises. (*Re Cousins.*) And where the notice imputed is a fraud committed by the solicitor himself, the knowledge of the solicitor will not be the knowledge of the client, because it is not likely that the solicitor would communicate his own fraud. (See *Cave* v. *Cave*, and *Kennedy* v. *Green.*)

Constructive notice now codified by the Conveyancing Act, 1882.

The whole subject of constructive notice is now codified by the Conveyancing Act, 1882, s. 3. This provides as follows :—

(1) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing, unless :—

(a) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him ; or,

(b) In the same transaction, with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel as such, or of his solicitor or other agent as such, or would have come to the knowledge of his solicitor or other agent as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2) This section shall not exempt a purchaser from any liability under or any obligation to perform or observe any covenant, provision, condition or restriction contained in any instrument under which his title is derived, mediately or immediately ; and such liability or obligation may be enforced in the same manner and to the same extent as if this section had not been enacted.

(3) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

The section applies to purchases made either before or after the commencement of the Act (1st January, 1883).

Effect of the statutory provision.

This section seems to have made no change in the doctrine as established by the cases, except that it narrows the law of con-

structive notice by confining the knowledge received by a solicitor or agent to the same transaction as that in which the question of notice arises. (*Re Cousins;* and *Bailey* v. *Barnes.*)

The latest decision on constructive notice.

We conclude our consideration of the subject of notice by calling your attention to the quite recent case of *Bailey* v. *Barnes.* In this case it was sought to fix a purchaser with constructive notice of a charge, and the court said that in determining the question whether he had notice or not, it was not so much a question whether he had the means of obtaining, and by prudent caution might have obtained, knowledge, but rather "was the not obtaining notice an act of gross and culpable negligence?" And it was held that A., who had an equitable claim to property, subsequent in date to an equitable claim which B. had, obtained priority over B. by getting in the legal estate; and this although, had A.'s solicitors been more cautious and more perspicuous, they would have obtained notice of B.'s charge; yet, as there had not been any "gross and culpable negligence," the maxim "where the equities are equal the law prevails," applied for A.'s benefit, and the fact that the person by whom the legal estate was conveyed to A. had notice of B.'s charge was immaterial, since in conveying to A. he had not been guilty of any breach of trust of which A. was aware. It was further held that the fact that the legal estate was got in *pendente lite* made no difference.

Patent defects.

You will also bear in mind that you must keep your eyes open for what are known as "patent" defects, for of these the law always presumes you have notice.

(6) *Waiver of Objections to the Title.*

Waiver may be express or implied.

Any objections made to the title, or the right to have a good title shown to you, may be waived before the conveyance of the property to you either expressly or impliedly.

(i) As to express waiver.

First, as to express waiver. A purchaser is not bound by his counsel's acceptance of a defective title, even though the defect appear on the abstract. (*Stewart* v. *Allison.*) And if he accept the title "as abstracted," this does not amount to a waiver of the right of having the abstract properly verified. (*Southby* v. *Hutt.*) Again, acceptance of the title will not bind him when the vendor conceals some material fact. (*Bousfield* v. *Hodges.*)

(ii) As to implied waiver—(a) taking possession.

Secondly, as to implied waiver. This may be inferred from the acts of the purchaser. The mere taking possession of the land alone is not generally sufficient to amount to a waiver, if such possession can be accounted for on other grounds than the supposition that the purchaser thereby intended to evince his satisfaction with the title. Thus, if it be taken in accordance with the intention of the parties, as evidenced by the contract or by the vendor's consent, it will not amount to waiver. (*Vancouver* v. *Bliss.*) But if the taking of possession be accompanied with other acts which countenance such a supposition, a waiver may be inferred. Thus, where the purchaser took possession, retained the abstract for a long time, altered and let the premises, and apologised to the vendor for his delay in paying the purchase-money, this was held to amount to an admission that the title was approved. (*Margravine of Anspach* v. *Noel.*) And when a presumption does arise of waiver from the taking of possession, it may be rebutted by other evidence. (*Hyde* v. *Warden.*) Further, possession taken with a knowledge of defects in the title is not a waiver of the right to have those defects removed by the vendor if he can remove them. (*Re Gloag and Miller.*)

(b) tendering draft conveyance.

The preparation and tendering to the vendor of the draft conveyance will sometimes, but not always, amount to a waiver of objections to title. Thus, where after the requisitions had been sent in and answered, and a draft conveyance tendered to the vendor without prejudice to the requisitions, as the purchaser took no objections to the replies to the requisitions, and the only negotiation pending between them was the payment of the purchase-money, it was held that the title must be deemed to have been accepted. (*Sweet* v. *Meredith.*) An attempt to re-sell by the purchaser is not conclusive that he has accepted the title; but it may be taken in conjunction with other facts so as to lead to that inference. (*Simpson* v. *Sadd.*)

(7) *Production of the Deeds.*

Excuses for non-production.

If the deeds are not in the possession of the vendor, as *primâ facie* they ought to be, you should take care that their possession by someone else is satisfactorily accounted for. There are several cases in which the facts of the case may show sufficient

reason why the vendor has not the custody of the deeds. Thus:—(1) The person who sold to him may have retained part of the land to which the deeds relate; in this case, by sect. 2 (5) of the Vendor and Purchaser Act, 1874, he is entitled to retain the documents, even although the portion retained is the least in value. The production of the deeds, however, can in such a case be enforced in equity on a sale by the purchaser (*Fain* v. *Ayres*), even although there is no covenant to produce, which there usually will be. Such a covenant cannot always be given; and the Vendor and Purchaser Act, s. 2 (3), specially provides that it shall not be an objection to the title that the vendor is unable to furnish the purchaser with a legal covenant to produce the deeds, provided the purchaser will, on completion, have an equitable right to the production. (2) You may be purchasing from a remainderman; in this case the legal owner of the life estate preceding the remainder is entitled to the custody of the deeds. But he can be compelled by the remainderman to produce them for your inspection—at least, if he be a vested remainderman (*Davis* v. *Lord Dysart*); if the remainder be a contingent one only, it would seem that the remainderman cannot enforce production. (*Noel* v. *Ward.*) (3) The vendor may have mortgaged the property; in this case the mortgagee will, of course, have possession of the deeds. Before the Conveyancing Act, 1881, the mortgagee was not bound to produce the deeds until he was paid off. (*Sparks* v. *Montriou.*) The mortgagor was, indeed, entitled to have the mortgage deed itself produced to him, for that was as much evidence of his right to redeem as of the mortgagee's right to the property. (*Patch* v. *Ward.*) Now, however, by sect. 16 of the Conveyancing Act, 1881, the mortgagor, as to mortgages made after the commencement of the Act, notwithstanding any stipulation to the contrary, may, as long as his right to redeem subsists, at his own costs, and on paying the mortgagee's costs, inspect and make copies or abstracts of, or extracts from, the documents of title relating to the mortgaged property in the custody or power of the mortgagee. (4) You may be purchasing from one of several joint tenants; in this case the vendor, if he has not the deeds in his own custody, may compel his co-tenants to produce the deeds for the inspection of a purchaser. (*Burton*

(i) The vendee's vendor may be entitled to retain.

(ii) Vendor may be a remainderman.

(iii) Vendor may have mortgaged the property.

(iv) Vendor may be one of several joint tenants.

(v) Property may be part of a larger estate.

v. *Neville*.) The same rule would seem to apply when you are purchasing from one of several tenants in common. (5) You may be purchasing property which was originally a part only of a larger estate, and on the sale thereof the title deeds were not handed over to the purchaser of the lot you are now buying.

(vi) The property may be an equitable interest.

(6) You may be purchasing an equitable interest in property, and in this case the title deeds will usually be with the owner of the legal estate. But it has been recently held in *West* v. *Wythes*, that since the Settled Land Act, 1882, a tenant for life under a strict settlement, though a mere equitable tenant, is, in most cases, owing to his power of dealing with the legal estate under that statute, entitled to the custody of the title deeds. Production may be enforced by the court on taking out a summons returnable in chambers. (*Thompson* v. *Teuton*.)

As to place of production.

As to the place and the expenses of production. The vendor may produce the deeds either at his own known residence, upon or near the estate, or in London; in these cases the purchaser had, and still has, to pay for the necessary journeys, &c., of his solicitor. If, however, the deeds are in London, and your office is in the country, you should not put your client to the expense of a journey by yourself to London, but should instruct your agents there to make the examination. (See *Alsopp* v. *Lord Oxford*.) If the deeds are at some other country town, you may go yourself to examine them, or send a clerk. (See *Hughes* v. *Winne*.) If the vendor has not got the deeds themselves, but only a covenant for their production, he is bound to procure their production for you. (*Rippingall* v. *Lloyd*.)

As to expenses of production.

Sect. 3 (6) of the Conveyancing Act, 1881, is important on this point. It provides that the purchaser shall bear all the expenses of the production and inspection of all acts of parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents not in the vendor's possession, and the expenses of all journeys incidental to production, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested stamped office or other copies or abstracts of, or extracts from, such documents; and if the vendor retains possession of any document, the expenses of making any

copy thereof, attested or unattested, which a purchaser requires to be delivered to him, shall be borne by the purchaser. This sub-section is not intended to interfere with the duty of the vendor to produce a proper abstract, and on an open contract the vendor must bear the expense of procuring, for the purpose of drawing his abstract, any deed forming part of the forty years' title, or other title agreed upon, although such deed be not in his possession. (*Re Johnson and Tustin.*) In other words, while the section throws on the purchaser every expense connected with the production of deeds, &c. not in the vendor's possession which the law may require for the purpose of verifying the abstract, &c., it does not go so far as to compel the purchaser to pay for the expense incurred by the vendor in the production, &c. of deeds, &c. which the vendor may require in order to enable him to make out the abstract which he is bound to furnish to the purchaser. (And see *Willett* v. *Argenti.*)

CHAPTER VI.

SEARCHES FOR INCUMBRANCES.

The necessity for searching.

It will be your duty immediately, or as nearly as possible immediately, before the completion of the sale, to make a search for incumbrances which may affect the title, and which are required by the law to be registered. These searches should always be made, or at least such of them as are known as the usual searches, for you will be liable for any loss which may be occasioned by your omission to search, unless, indeed, your reason for not searching is that counsel advised that no search was necessary, or your client expressly authorized you not to search. (See *Watts* v. *Porter*.) We propose to treat in the next few pages of searches for the following incumbrances:—

I. Usual Searches.

(1) County Registers; (2) Judgments and Executions; (3) Crown Debts; (4) *Lites pendentes;* (5) Annuities; (6) Statutory Land Charges.

II. Special Searches.

(1) Judgments in Palatine Counties; (2) Customaryhold Land Court Rolls; (3) Disentailing Deeds; (4) Deeds Acknowledged; (5) Bankruptcy Proceedings and Deeds of Arrangement.

We then propose to consider, as a third main head, the mode in which the search for incumbrances required to be registered may be conducted under the 2nd section of the Conveyancing Act, 1882, and the Rules issued thereunder.

I. Usual Searches.

(1) *County Registers.*

When the land which your client is purchasing is situated in any of the counties which are supplied with local registries, *i. e.*, Middlesex, Yorkshire, Kingston-on-Hull, and the Bedford Level, searches should be made in the local registers to see if there are any registered incumbrances which might take priority over the assurance to your client. In a future chapter we shall discuss the requirements of the various statutes which provide for registration of deeds, wills, &c., affecting lands in these counties. At present we shall confine our remarks to pointing out what searches a purchaser should make. Of county registers.

As to Lands in Middlesex.

The effect of the statutes which regulate registration of assurances, &c., concerning lands in Middlesex, may be conveniently summarised as follows:— (a) As to lands in Middlesex.

(1) A registered equitable charge will not affect your client unless he has also notice of it. (*Tiseman* v. *Westland.*)

(2) But notice of such a charge will bind your client although it be not registered; at least, if the notice be *actual.* (*Le Neve* v. *Le Neve.*)

(3) A crown debt, or *lis pendens*, though registered in the local registry, will not affect you unless it is also registered in the central office in London.

(4) If you search the register at all you will be deemed to have notice of all incumbrances registered during the period over which you extend your search. As there is no provision for re-registration in these cases, you should search for the whole period covered by the abstract.

(5) The Middlesex Registry Act (7 Anne, c. 20), does not extend to copyholds, leases at a rack-rent for any period, or occupation leases for twenty-one years or less, to chambers in Serjeants' Inn, the Inns of Court or the Inns of Chancery, or to lands which are registered under the Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 127; nor does it extend to lands in the City of London, nor to lands of copyhold tenure, but it applies

to a deed of enfranchisement of copyholds. (See *Reg.* v. *Lord Truro.*)

(6) Six months are allowed for the registration of a will if the testator dies in the United Kingdom; if he dies on or beyond the seas three years are allowed; and it has been decided that where a will is not discovered for more than six months after the testator's death, and consequently there has been no registration within the six months, the devisees will not be protected against a sale by the heir. (*Chadwick* v. *Turner.*) But by the Vendor and Purchaser Act, 1874, s. 8, though the will has not been registered within the proper time, yet an assurance from the devisee, if registered before, will nevertheless have priority over any assurance from the heir-at-law.

The result of this is that, on purchasing from a devisee, you need not register the will if on a search you ascertain that there has been no conveyance from the heir, but the registration of the conveyance to your client will be sufficient.

By virtue of the Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), which came into operation on 1st April, 1892, it is not necessary, in order to give validity to a judgment, statute or recognizance, to register it in the Middlesex Registry as required by the Middlesex Registry Act, 1708 (see sect. 6); and by the same statute the business of the Middlesex Registry, which used to be transacted in Great James Street, Bedford Row, is now transferred to the Land Registry in Lincoln's Inn Fields (formerly Staple Inn) (sect. 1), and this is where the necessary searches are now made; and by the same act it is provided that such searches can be made through the registrar, and his certificate as to the result thereof obtained. (See sect. 2, and No. 11 of the regulations thereunder in the schedule to the act.)

As to Lands in Yorkshire.

(b) As to lands in Yorkshire.

Before January, 1885, the effect of the statutes, 2 & 3 Anne, c. 4; 6 Anne, c. 20; 6 Anne, c. 62; and 8 Geo. 2, c. 6, was to put lands in Yorkshire on a similar footing to that on which lands in Middlesex stand. But by the Yorkshire Registries Act, 1884 (47 & 48 Vict. c. 54), s. 51, these statutes are repealed, and the law consolidated and amended. The Act of

1884 was supplemented by an amending Act in 1885 (48 & 49 Vict. c. 26). As far as incumbrances are concerned the Act seems to have introduced the following changes:—

(1) It does not require the registration of judgments, so that it is not necessary to register judgments in the local registry.

(2) As to conveyances, &c. which are not registered, the Act provides that they shall not avail even against a purchaser with notice, whether actual or constructive, of them, in the absence of actual fraud on his part. Consequently, if, after contract for sale and purchase of lands in Yorkshire, the purchaser hears of an incumbrance on the property, which on searching he discovers is not registered, he can safely complete his purchase, and by registering obtain priority. This differs from the law as applied to the Middlesex registry. (*Vide supra*, p. 141; and *Le Neve* v. *Le Neve*.)

(3) Besides searching for registered deeds, wills, &c., you must also, in future, search for registered caveats. The registration of these caveats is an innovation. Shortly, the act provides that a caveat may be registered by any person claiming to be entitled to any lands in Yorkshire in favour of any person named therein, and, when entered, will remain in force for such time as named in the caveat, subject to the rules drawn up under the act; and if within the time the person giving the caveat conveys the land mentioned therein to the person in whose favour it was given, and the deed effecting the conveyance be duly registered, then the assurance will have priority as though it had been enrolled on the date on which the caveat was enrolled. (Sect. 10, as amended by the Act of 1885.)

(4) As to wills. When the registration of a will cannot be effected, a notice of the will may be registered, and this will be effectual if the will is subsequently registered within two years of the testator's death. (Sect. 11.)

(5) The acts do not apply to leases not exceeding twenty-one years, nor to lands of copyhold tenure. (And see *Reg.* v. *Lord Truro*, *ante*, p. 141.)

The Act of 1884 contains (sects. 20—23) provisions for the making of official searches nearly identical with the provisions as to such searches contained in the Conveyancing Act, 1882. (See *post*, pp. 153—156.)

(2) *Judgments and Executions.*

As to judgments generally.

A creditor who has been at the trouble and expense of taking legal proceedings against his debtor, and who has obtained a judgment against him, is entitled to have a charge on the lands as well as the pure personal estate of the debtor. But in order to prevent purchasers from being deterred from freely buying lands, from a fear that they may find them liable in their hands to hidden claims, the legislature has, for the protection of purchasers, provided a system of registration of judgments, &c., and enacted that lands shall not be affected in their hands unless this registration is observed. We propose to give here a brief summary of the statutes which make it necessary for a judgment creditor to register his debt, and to examine what effect they have as against lands in the hands of a purchaser.

(a) Judgments before 1838.

Under the Statute of Westminster a judgment creditor could issue a writ of elegit, under which one-half of the debtor's land could be taken; but "land" under this statute did not include copyholds, estates in joint tenancy after the death of the joint tenant who was indebted, or estates tail in the hands of the issue in tail. Under the Statute of Frauds (29 Car. 2, c. 3), equitable estates, when held by a trustee for the debtor's sole and beneficial interest, were for the first time allowed to be taken in execution to the same extent as legal estates.

(b) As to judgments after 1838, and before July 24th, 1860.

By 1 & 2 Vict. c. 110, the *whole* of a debtor's land was made liable to be seized under an elegit, and copyholds and equitable estates, joint estates and estates tail (see hereon *Anthony* v. *Anthony*), and property over which the debtor had a general power of appointment, were included. Judgments were made a charge on the debtor's lands, whether held at the date of entering up judgment or subsequently acquired, and were made binding not only on the debtor, but on all persons claiming under him, including issue of his body, remaindermen and reversioners. But under this statute a judgment creditor, though he acquired the legal estate under an elegit, held it subject to prior equitable incumbrances, although he had no notice of them. (*Whitworth* v. *Gaugain.*) By sect. 19, no judgments by virtue of that act are to affect lands, as to purchasers and mortgagees, unless registered in the manner

provided in the name of the person whose estate is to be affected.

By 2 & 3 Vict. c. 11, re-registration of the judgment every five years was rendered necessary; and it was declared that purchasers and mortgagees without notice of a judgment should not be affected by it, although it was duly registered, any further than they would have been before the 1 & 2 Vict. c. 110. The effect of this statute is, that a search for five years back from the completion of the purchase is sufficient to protect the purchaser as far as the extended remedies given to the creditor by the 1 & 2 Vict. c. 110, go. (*Beavan* v. *Earl of Oxford;* and *Barham* v. *Keene.*) (c) As to re-registration.

By 3 & 4 Vict. c. 82, s. 2, it was declared that no judgment was to affect lands by virtue of 1 & 2 Vict. c. 110, unless it was registered, notwithstanding that the purchaser had notice of it. (d) As to registration of judgments under 1 & 2 Vict. c. 110.

By 18 & 19 Vict. c. 15, it was declared that no judgment which might be registered under 1 & 2 Vict. c. 110, should affect lands as to purchasers, unless a memorandum thereof was registered, notwithstanding that the purchaser had notice; and by sect. 6, if a judgment is found registered within five years prior to the purchase, it is of no consequence that more than five years have elapsed between that and a previous registration. (e) As to judgments under 1 & 2 Vict. c. 110.

By 23 & 24 Vict. c. 38, s. 1, no judgment entered up after the 23rd July, 1860, is to affect any land as to a *bonâ fide* purchaser or mortgagee, even with notice of the judgment, unless a writ of execution has been issued thereunder and registered; and no such writ may be put in force, except within three calendar months from the time when it was registered. The writ is to be registered in the name of the creditor. (f) As to judgments between July 23, 1860, and July 29, 1864.

By 27 & 28 Vict. c. 112, no judgment entered up after 29th July, 1864, is to affect land until it has been actually delivered in execution by virtue of a writ of elegit or other lawful authority. Under this statute it was held, in *The Cowbridge Rail. Co.* v. *Guest*, that a judgment creditor had no lien on the land until he had got a return to the writ actually placed in the hands of the sheriff; and in *Re The Duke of Newcastle*, it was held that an equitable interest in leaseholds could not be "actually delivered in execution." But in *Hatton* v. *Hayward*, equitable interests being admittedly within the statute, it was (g) As to judgments after July 29, 1864.

held that if the creditor who has sued out an elegit cannot obtain delivery by the sheriff of the lands, owing to the legal estate being outstanding, he might apply to the court to remove the impediment, and an order of the court doing so will be equivalent to a delivery in execution within the statute; and at the present time this "equitable execution" is effected by the simple appointment of a receiver by the court in which judgment was obtained; and if before the completion of the purchase a receiver of the debtor's lands has been appointed, the judgment creditor is entitled to the lands as against the purchaser. Formerly, any such process of execution whereby lands were delivered in execution gave the creditor the right to the land as against a subsequent purchaser, even though neither the judgment nor the process of execution was delivered in execution. (*Re Pope.*)

(h) As to executions on such judgments.

But as to writs of execution and orders affecting land (which will include orders appointing a receiver or sequestrator by way of equitable execution) issued or made after the 31st December, 1888, it is provided by the Land Charges Registration Act, 1888 (51 & 52 Vict. c. 51), that such writs and orders shall be registered at the office of the land registry, otherwise they will be void as against a purchaser for value of the land. The act requires re-registration every five years, and provides that registration under the act shall have the same effect as, and make unnecessary, registration in the central office, under any other act.

Jay v. *Johnstone.*

In *Jay* v. *Johnstone* it was recently held that, by virtue of the Statute of Limitations (37 & 38 Vict. c. 57, s. 8), no judgment, whether charged on lands or not, could be enforced by action, except within twelve years of its being obtained, and that after this time the court could not give leave to issue execution on the judgment.

Summary of statutes.

The result of the above statutes, as they affect the searches you should make for judgments, would seem to be:—

(1) Search the register at the central office for a period of five years from the date of the search. You will find from the register if there is any judgment extant which was entered up before the 23rd July, 1860.

(2) If there is such a judgment, and it has been duly re-registered, you will, by virtue of these statutes, be bound by it,

although no execution has been issued on it and registered; but you practically hold the lands free from it (unless there has been within twelve years some payment on account of the debt or interest), since there is no means of enforcing the judgment, owing to the decision in *Jay* v. *Johnstone;* and, indeed, as the Statutes of Limitations affecting land bar all rights as well as remedies, the land would be free from the judgment in the purchaser's hands in spite of its registration and re-registration.

(3) If you find a judgment entered up between the 23rd July, 1860, and the 29th July, 1864, the practice is to make a further search in the name of the creditor for registered writs of execution, and if any such are found to ascertain if they have been put in force within three months from registration. If they have not, both the judgment and the execution may be disregarded; but, owing to *Jay* v. *Johnstone*, and subject to the exception aforesaid, it is impossible that such execution could have been issued, and therefore such registered judgments can also be ignored.

(4) If you find a judgment entered up since the 29th July, 1864, search in the Land Registry in the debtor's name to see whether his interest in the lands has been taken in execution under the judgment either by means of a writ of elegit, or an order appointing a receiver or sequestrator. If you find no such process of execution registered, you will feel certain that your client is safe in completing as far as any claims under an execution are concerned, as he is amply protected by the Land Charges Act, 1888, and this although he may have notice of the judgment and of the execution. A search for five years back will in all cases be sufficient, as the registration must be repeated every five years.

(5) You may find that there has been a judgment duly entered up and registered, but satisfaction has been entered of it under 23 & 24 Vict. c. 115; you may in this case obtain a certificate of the fact. You will bear in mind that while it is always desirable to search for a judgment, yet it is not necessary to do so. What, then, will be the effect of your not searching in the event of there being a judgment against the vendor entered up after 1838 and before 29th July, 1864, and not satisfied at the completion of the purchase? The answer to this

question was formerly found in sect. 5 of 2 & 3 Vict. c. 11, and was to the effect that the judgment in such a case only bound the lands in the hands of your client (a purchaser without notice) as far as it would have done had it been obtained before the passing of 1 & 2 Vict. c. 110; *i.e.*, if the lands are freehold, half will be liable to be taken for the judgment debt; if copyhold, or property over which the debtor had a general power of appointment, no part of the lands could be seized in respect of the judgment; but the answer to which question is now to be found in *Jay* v. *Johnstone*, and is to the effect that your client will not be affected by the judgment at all, as (unless there has been some part payment of the debt or of interest thereon within twelve years) too long has elapsed for an action to be brought on the judgment or execution issued thereon. Again, supposing such a judgment is not registered, but your client (the purchaser) has notice of the judgment, is he bound by it? The answer to this question is afforded by 3 & 4 Vict. c. 82, s. 2, and is to the effect that the purchaser takes the property free from any claim on the part of the judgment creditor, even if the judgment were enforceable, which it is not, by reason of *Jay* v. *Johnstone* aforesaid.

(3) *Crown Debts.*

How far crown debts bind.

Debts by simple contract to the crown do not bind the land of the debtor, but debts upon record, or by specialty, constitute charges on all his land except copyholds; and as to leaseholds, they are only bound as from the *teste* of the extent or writ of execution.

An accountant to the crown (*i.e.*, a person holding under the crown an office in existence at the time of 13 Eliz. c. 4, and in arrear with payments due to the crown) is a debtor by specialty to it, and the lien of the crown on his land attaches to his lands from the time he becomes an accountant, even for money which becomes due from him after the alienation of the land. (*Coxhead's Case.*) Before 1839, crown debts were not required to be registered; but by 2 & 3 Vict. c. 11, s. 8, no bond given to the crown is to affect the debtor's land till registered in the Court of Common Pleas. Re-registration was not required till the 22 & 23 Vict. c. 35, s. 48; but by that statute

re-registration every five years is made essential, and it was provided that purchasers, &c., though they have notice, are not to be bound unless the debt is duly re-registered. Furthermore, by 28 & 29 Vict. c. 104, s. 48, crown debts dated after the 5th July, 1865, are not to affect the lands of the debtor as to *bonâ fide* purchasers or mortgagees, though they have notice of them, unless a writ of extent or other process of execution is issued and registered before the execution of the conveyance and payment of the purchase or mortgage money. You should note that crown debts now become a charge on the land immediately on the registration of the writ, and they are not, like judgments, only so when actually delivered in execution. To sum up, then, you should extend your search for crown debts for a period of five years from the date of your search. If you find a debt entered up prior to 5th July, 1865, you should insist on its removal, or upon the vendor obtaining a certificate from the Commissioners of the Treasury, or any two of them, stating that the lands sold may be held free from any claim on the part of the crown; if you find one entered up subsequent to that date, you should make a further search for writs of extent, &c. If you find none, you may complete your purchase in safety.

Search for crown debts.

In this case, also, you may find that satisfaction of a registered crown debt has been entered up. (23 & 24 Vict. c. 115.) This will be done upon a certificate of the commissioners or principal officer of the department holding the bond being filed at the office.

Satisfaction of crown debts.

(4) *Lites Pendentes.*

A *lis pendens*, *i.e.*, an action pending respecting the property, is not in itself an incumbrance on the property, but it fixes the purchaser with notice of an adverse claim or unsatisfied charge against it, and a purchaser will be bound by the decree made, whether he has notice of the pending proceedings or not. (*Bishop of Winchester* v. *Payne*.) But notice of the existence of a registered *lis pendens* creates no charge on the property, and all the registration does is to require the purchaser to look into the claims of the plaintiff who registers it. Therefore, if, on inquiry, the suit turns out to be founded on a claim which is not sustainable, the purchaser cannot refuse to complete. (*Bull* v. *Hutchins*.) The purchaser will not be bound by a decree in an action which does

A *lis pendens* is not a charge on property, only notice.

not directly affect the land itself; thus, where money was secured on an estate, and there was a question in court about the right to that money, but none relating to the estate on which it is secured, the purchaser, if without actual notice, will not be affected by the decree made. (*Worsley* v. *Earl of Scarborough.*)

Searches for *lites pendentes.*

Registration of a *lis pendens* is required by 2 & 3 Vict. c. 11, or a purchaser without notice will not be bound by it; and by the same statute re-registration every five years is made necessary.

In effect, then, you should search for a *lis pendens* for five years from the date of your search; if you should find a registered *lis pendens* you should then require to be satisfied that the pending action or matter is not one which affects the vendor's power to dispose of the property; if it is, you should, of course, decline to complete. Provision is made by 23 & 24 Vict. c. 115, for the entering up of satisfaction to a registered *lis pendens* on the filing of an acknowledgment by the plaintiff in the form and to the effect in the statute mentioned.

(5) *Annuities.*

What annuities must be registered.

Annuities granted after the passing of 18 & 19 Vict. c. 15, are required by sect. 12 of that statute to be registered. The annuities comprehended by this act are "annuities or rent-charges created otherwise than by marriage settlement or will, for one or more life or lives, or for any term of years or greater estate determinable on a life or lives." If these are not duly registered in the name of the person whose estate is intended to be affected, they will not affect any purchaser or mortgagee without notice. But a purchaser who, at the time of completing his purchase, has notice of such an annuity will be bound by it, although it is not registered (*Greaves* v. *Topfield*); for there is nothing in the statute (as there is in the case of judgments) to exclude the doctrine of Equity, namely, that the object of the legislature in requiring registration is to give notice to the purchaser, so that a purchaser who has got notice, even though it be informal notice, has all that the statute was intended to give him. And an unregistered annuity is good against a judgment creditor or a trustee in bankruptcy whether he has or has not notice of it. There seems to be no provision for the re-registration of annuities, so that the search should extend

In whose name registered.

over the whole period covered by the abstract. Satisfaction of a registered annuity may be entered up under 23 & 24 Vict. c. 115. But it is not enough to prove that the annuity is expired; and length of time will not always operate as a presumption of its satisfaction (*Wynn* v. *Williams*): evidence should be required that it has been duly paid up to its expiration, as six years' arrears are still recoverable. (3 & 4 Will. 4, c. 42.)

(6) *Land Charges.*

What a land charge is.

A land charge is defined by the Land Charges Registration Act of 1888 as a rent or annuity or principal moneys payable by instalments or otherwise charged, *otherwise than by deed*, on land under some act of parliament for securing any person moneys spent by him, or costs or expenses incurred by him, under such act; or moneys advanced by him to repay moneys spent or costs or expenses incurred by another person under some act of parliament; and also a charge under sect. 35 of the Land Drainage Act, 1861, or sect. 29 of the Agricultural Holdings Act, 1883. It does not include a sanitary authority's charge in respect of paving expenses under the Public Health Act. (*R.* v. *Holt.*) Land charges (thus understood) created after 31st December, 1888, are now to be registered in the Land Registry, otherwise they will be void as against a purchaser for value of the land charged. Moreover, one year after the first assignment by act *inter vivos* after 31st December, 1888, of a land charge created before that date, the person entitled to the charge cannot recover it as against a purchaser for value of the land charged unless he registers the charge. You will thus, when making your search in the Land Registry for executions (writs of elegit, &c.), at the same time search for land charges, and if you find any such land charge registered refuse to complete until the vendor has removed it or given some satisfactory indemnity in respect of it.

II. Special Searches.

(1) *Searches of Court Rolls.*

Searches in the court rolls.

When the land is copyhold, a search should be made for incumbrances not appearing on the abstract; such search should extend over the whole period covered by the abstract. In practice, however, this search is seldom made.

(2) *Searches for Disentailing Deeds.*

Searches for disentailing deeds.

Only necessary when land entailed.

If the land has been entailed, and there is any reason to suspect that a disentailing deed has been suppressed, a search should be made in the Chancery Enrolment Office for the enrolled disentailing deed. (3 & 4 Will. 4, c. 74, ss. 40, 41.)

(3) *Searches for Acknowledged Deeds.*

Searches for acknowledged deeds.

When necessary.

When the property has belonged to a married woman before the year 1883, a search in the central office should in some cases be made for the certificate of the enrolment of the acknowledgment of the married woman. Such a search may appropriately be made when it is suspected that she has conveyed away the property by a deed not disclosed by the abstract.

(4) *Searches for Bankruptcy and similar Proceedings.*

Searches for bankruptcy proceedings.

Only necessary in suspicious cases.

Whether a search should be made in the Bankruptcy Rolls to see if a receiving order, &c., has been made against the vendor, or in the Land Registry to see if he has executed some deed of arrangement, is a matter entirely depending on the circumstances of the case. In *Cooper* v. *Stephenson*, it was held that whenever a solicitor has reason to suspect that an intended mortgagor has been bankrupt or insolvent, he ought to make a search, and it will amount to negligence making him liable to his client if he does not do so. You must use your own discretion as to when it is proper for you to search: if you do search, a five years' search will generally be sufficient, though in some cases it may well be carried back for twelve years. Your client will, owing to the provisions of the Land Charges Act, 1888, take the property free from any deed of arrangement affecting it unless it is registered in the Land Registry, and this, apparently, although he may have notice of the deed. (Sects. 7, 8, and 9.)

In a recent case (*New Land Development Association* v. *Gray*), a purchaser of real estate completed his purchase without making any search in the Bankruptcy Rolls. It happened that a receiving order had been made against the vendor, and it was held that the purchaser had no title as against the trustee in bankruptcy, although he had no knowledge of the bankruptcy.

III. Mode of Searching.

Provisions of the Conveyancing Act, 1882, as to searching:

Searches formerly had to be made by the solicitor himself: but sect. 2 of the Conveyancing Act of 1882 contains a most useful provision for the making of most of the usual searches by an official of the court; he certifying to the solicitor the result of his investigations. The course pointed out by the act is not a compulsory one, and it is still open for you to make your search in person in the old way. But you will do well to adopt the method of inquiry set out by the statute, for you will thereby avoid the trouble and responsibility of a personal search, and at the same time obtain full protection from any errors in the certificate. As the section of the act will be so useful to you in practice we set it out.

(i) Searches to be made in the central office:

"2.—(1) Where any person requires, for purposes of this section" (*i. e.*, sales, mortgages, leases, and the like), "search to be made in the central office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any act, he may deliver in the office a requisition in that behalf, referring to this section.

(ii) Certificate of result:

"(2) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(iii) Certificate to be conclusive:

"(3) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(iv) Requisitions to search must be in writing:

"(4) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(v) General rules:

"(5) General rules shall be (and have been) made for the purposes of this section.

(vi) As to fraud by clerk:

"(6) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(vii) Act not to prejudice other rights as to search:

"(7) Nothing in this section, or in any rule made thereunder, shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such rule had not been enacted or made.

(viii) Solicitor not to be answerable:

"(8) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(ix) Nor trustees:

"(9) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons shall not be so answerable.

(x) nor unrepresented persons:

"(10) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(xi) Not to apply to deeds enrolled:

"(11) Nothing in this section applies to deeds enrolled under the Fines and Recoveries Act, or under any other act, or under any statutory rule.

(xii) Not to extend to Ireland.

"(12) This section does not extend to Ireland."

Summary of rules made under the section.

The rules made under the section shortly provide that the requisition is to state the name and address of the person requiring the search, and that the requisition and certificate shall be filed in the office where the search was made. You or your client will have to sign a declaration in a specified form that the search is required for the purpose of a sale, mortgage, or lease, as the case may be. Further, the rules provide forms in which the requisition for searches is to be made, applicable to the several cases of search—in the enrolment office for deeds enrolled, in the bills of sale department for bills of sale, in the registry of certificates of acknowledgments of deeds by married women, and in the registry of judgments for judgments, revivals, decrees, orders, rules, and *lis pendens*, for judgments at the suit of the crown, statutes, recognizances, crown bonds, inquisitions, and acceptances of office, for executions, and an-

nuities. Provision is also made, when a certificate setting out the result of a search has been issued, for the continuing of the search for a calendar month from the date of the certificate, and the result of the continued search may be endorsed on the original certificate.

The following forms must be used with reference to official searches :—

FORM OF REQUISITION FOR OFFICIAL SEARCH.

Volume Page No. .

North Riding of Yorkshire. Registry of Deeds.

Requisition on behalf of [*name and description of the person on whose behalf the search is required to be made*] for official search in the name of (*d*), for the period from the day of , 18 , to the day of , 18 , for all instruments registered as affecting lands in the townships of in the said riding.

(Signed) .

FORM OF OFFICIAL CERTIFICATE OF SEARCH.

Volume Page No. .

North Riding of Yorkshire. Registry of Deeds.

I, , the Registrar of Deeds of the North Riding of the county of York, having received a requisition on behalf of for an official search in the name of , for the period from the day of , 18 , to the day of , 18 , affecting lands in the townships of in the said riding, do hereby certify that I have caused an official search to be made in the above-specified name, for all instruments registered within the period above mentioned as affecting lands within the townships aforesaid, and that the following is a complete list of such instruments.

Nature of Instrument.	Date of Instrument.	Parties to Instrument.	Township, &c. in which lands affected are situate.	Date of Registration.	Place of Enrolment.		
					Volume.	Page.	Number.

(Signed) .
Registrar (L.S.)

(*d*) If a search is required to be made in more names than one, a separate requisition must be made in respect of each name.

The fees for searching in the Central Office are: (1) in the case of an ordinary search 1*s.* for any one name, for any period not exceeding ten years, and 6*d.* for every additional five years; and (2) in the case of an official search the sums are 7*s.* 6*d.* and 2*s.* 6*d.*, instead of 1*s.* and 6*d.*

Provisions of Vendor and Purchaser Act, 1874, as to disputes in requisitions.

Should you have any difficulty in respect of any of the requisitions on title, or the objections thereto, or as to any claim for compensation, or to any other question arising out of or in connection with the contract (not being a question affecting the validity or the existence of the contract), you may, under sect. 9 of the Vendor and Purchaser Act, 1874, apply for assistance to a judge of the Chancery Division, by taking out a summons in chambers. The judge is empowered by that act to make such order as appears just to him, and also to order how and by whom the costs of the application are to be borne and paid. Not only disputed questions of law and construction can be decided by a judge under this section, but also disputed questions of fact. (See *Re Burroughes.*) Applications have been made under this section to decide questions whether an attempted limitation was void for remoteness; whether succession duty was payable, and upon what events; who were the particular persons entitled under a devise to a class; whether a vendor had shown a title to the soil or only to rights of pasturage, &c.; whether the vendor should be at liberty to withdraw; whether the vendor ought to pay interest on the deposit when the sale goes off. (*Hargreaves and Thompson; Re Jackson and Woodburne's Contract.*) The costs will generally follow the event, but they are in the discretion of the court, and in some cases no order will be made as to them (see *Re Kearsley*); and even a successful applicant may be ordered to pay costs. (*Re Cooper.*) And the court has jurisdiction to order the vendor to pay the purchaser's costs of investigating the title, and to charge them on the vendor's interest in the property. (*Re Yielding and Westbrook.*) But the court cannot decide the question whether the vendor is bound as to the disposition of the purchase-money by a clause in restraint of anticipation. (*Re Tippett and Newbould.*) Nor will the court entertain the question of the return of the deposit to a purchaser who alleges that a condition of sale is misleading, as this is a matter involving the validity of the contract. (*Re Thomas and Turner.*)

CHAPTER VII.

THE FORM AND CONTENTS OF AN ORDINARY PURCHASE DEED.

You will now be ready to prepare the conveyance to your client. Before doing so it will be well to inform yourself on some of the points of law relating to deeds. The following points should be borne in mind :—

I. The Date.

Immateriality of date.

The date of the deed is not of very material consequence. The rule is that a deed operates from the time of its delivery; so that even if the deed is undated, or the date is an impossible one—the 30th of February, for example—the time on which the delivery was made will be the real date. And where the date stated in the deed does not correspond with the date on which delivery was made, the deed will take effect from the delivery. (*Goddard's Case.*) But of course in practice care should always be taken at the time the deed is executed to state the date correctly.

II. The Parties.

This part of the subject may be considered under two heads: (1) the parties conveying, and (2) the parties to whom the conveyance is made.

1. *The Parties conveying.*

The vendor is generally the only conveying party.

Who conveys when the vendor is—

(a) a lunatic;

The vendor may be the sole owner of the land, both at law and in equity, free from incumbrances. In this case he alone will be the conveying party. When the vendor is under any of the qualified disabilities mentioned in our first chapter, you must see that he conveys through his proper substitutes, or with the proper concurrence. Thus, if he is a lunatic, so found by

inquisition, the party to a conveyance of his estate will be his committee, with the consent of the Lord Chancellor, or of the judges having jurisdiction in lunacy. If he is an infant, seised in his own right of the land, he is a tenant for life within the Settled Land Act, 1882, s. 59, and the powers of sale which that act gives to tenants for life will be exerciseable by the trustees of the settlement under which he holds, if there are any; if not, by the person appointed by the Chancery Division, on the application of his next friend or guardian (sect. 60). We shall see hereafter what powers a tenant for life now has of absolutely disposing of the whole fee of the land. Again, if the vendor is a married woman, and the property which is the subject of the sale is not hers for her separate estate, either by the doctrines of equity or statute law, her husband must be joined, and the deed be duly acknowledged under the Fines and Recoveries Act. If the husband cannot be found, is incapable of executing a deed, or is living apart from his wife, his concurrence may be dispensed with by the court on the wife's application under sect. 91 of the act; and where the concurrence is dispensed with, the deed need not be acknowledged. (*Goodchild* v. *Dougal.*) The concurrence has been dispensed with where the husband and wife had been living apart for a long time, and the husband refused to join unless part of the purchase-money was paid to him (*Re Caine*), and where the husband was a lunatic. (*Re Harriet Turner.*) It can also be dispensed with when he is abroad, and, indeed, in any case where the court thinks proper to make the necessary order. Where the husband's concurrence is dispensed with, the conveyance does not affect his rights. (See sect. 91.)

(b) an infant;

(c) a married woman.

When there are incumbrances on the property.

You cannot require the vendor to obtain the concurrence of parties who are unnecessary, even though he has the power to obtain such concurrence (*Corder* v. *Morgan*), unless he has expressly contracted that he will obtain their concurrence. (*Benson* v. *Lamb.*) Thus in a sale by a mortagee under a power of sale, the purchaser cannot require the vendor to obtain the concurrence of the mortgagor (*Corder* v. *Morgan*), and this notwithstanding the fact that the mortgagor has in the mortgage deed agreed to join in any sale if required. (*Allen* v. *Marten*). The powers of sale given to mortgagees by the ordinary express

On sale by mortgagees mortgagor's concurrence cannot be required.

power inserted in mortgages, and that supplied by the Conveyancing Act, 1881, ss. 19, 20, are very ample; and as the purchaser, amongst other things, is not required to make inquiries as to whether a case has arisen to authorize the sale, and the mortgagee's receipt of the purchase-money is a sufficient discharge, there is no necessity for insisting on the concurrence of the mortgagor.

Concurrence of women entitled to dower can be required;

In some few cases there may happen to be in existence a wife of the vendor who is entitled to the old common law dower out of his lands (as to when this may occur, see *ante*, p. 125). Here the doweress is clearly an incumbrancer, and you will in most cases be entitled to have her concurrence for the purpose of getting a release from her dower.

Satisfied terms are now of no use to furnish a protection against dower, but the old rule was, if there was such a term outstanding created prior to the attaching of the right to dower, as equity would not remove the term in favour of the doweress, the purchaser could not insist on the getting the wife to concur, but would have to be content with an assignment of the term to a trustee for his benefit in trust to attend the inheritance. (See *Mole* v. *Smith*; *Maundrell* v. *Maundrell*.)

and, if refused, purchaser can withdraw.

When the wife's concurrence is necessary, and she refuses to concur, it would seem that you would be entitled to decline to complete; for the wife's claim is not a mere monetary one, but she might actually require to be put in possession of one-third of the land. If the purchaser, however, is willing to take the land in spite of its liability to the claims of a doweress, he is entitled to compensation. (*Wilson* v. *Williams*.)

Concurrence of trustees may be compelled.

The vendor may be compelled to obtain the concurrence of parties who are bound to convey at his request, *e. g.*, trustees of the legal estate. (*Costigan* v. *Hastler*.)

Parties with whose consent or by whose direction the conveyance is made.

(a) Concurrence of husband.

(b) Concurrence of protector.

There are many cases in which the consents of third persons may be necessary to an effectual sale. Thus, when the vendor is a married woman, and the property is not hers for her separate use, either in equity or by statute, the husband must be joined; and further, the deed must be acknowledged under the Fines and Recoveries Act. (See *ante*, pp. 6—9, 138.) Again, if the vendor is a tenant in tail, whose estate is preceded by a life estate, and you are purchasing from him the whole fee simple

subject to the life estate, the owner of the preceding life estate will be the protector of the settlement (presuming that it was created by the same instrument as that by which the estate tail was created), and his consent will be necessary, or else the vendor will not be able to convey to you more than a base fee. Such consent may be given either in the conveyance to you or by a separate deed, which, however, must be enrolled before or at the same time as the assurance to you is enrolled. (See 3 & 4 Will. 4, c. 74, and *post* in the chapter on disentailing assurances.)

(c) Concurrence of tenant for life.

If you are purchasing from trustees with a power of sale over land which is settled land within the Settled Land Act, 1882, and there is existing a tenant for life who would have the powers of sale conferred by that act, the trustees cannot sell without the consent of the tenant for life (if several persons together form one tenant for life, then the consent of any one of them is all the purchaser can require: see Settled Land Act, 1884, s. 6, sub-s. 2). (See also *In re Bedingfield and Herring's Contracts*, where it was held necessary for trustees who had a power of sale, exerciseable with the consent of the tenant for life, to obtain not only his consent, but also that of the incumbrancer of the life estate, and also of the trustee in bankruptcy, the tenant for life having incumbered his interest, and a receiving order having been made against him.) But if this settlement is a *trader's* settlement, and not a strict settlement, that is to say, if the lands are vested in the trustees upon trust for sale, the consent of the tenant for life is not necessary, unless the instrument creating the trust requires such consent. (See *Taylor* v. *Poncia*, and the Settled Land Act, 1884, s. 7.)

(d) Concurrence of trustees.

And though, under the same statute, the tenant for life has large powers of selling the settled land, and can do so as a rule without the necessity of obtaining any consents, yet if he wishes to dispose of the "principal mansion-house and the demesnes thereof, and other lands usually occupied therewith," he must obtain the consent of the trustees or an order of the court. (See sect. 10 of the Settled Land Act, 1890.) There are countless other cases, in which the consents of special officials or other persons are made necessary to make sales of land complete, required by special acts of parliament.

Conveyance by direction of purchaser to sub-purchaser.

As an example of a case in which one party may convey by the direction of another party, we may mention the common

case where your vendor has sold to you before he has obtained a conveyance of the land to himself from the person from whom he bought. Here, instead of getting his vendor to convey to him, and his then conveying to you, he will request his vendor to convey direct to you, he joining to pass his equitable interest and to covenant that he has done nothing to incumber it. The stamp duty on the conveyance in this case is reckoned on the sub-purchase, and not on the original, purchase-money. (See Stamp Act, 1891, s. 58, sub-s. 5.)

Parties joined for the purpose of giving covenants for title:

You may also find it of advantage sometimes to join as parties persons who do not actually contribute anything towards conveying the estate, but whose concurrence may be useful to your client on account of the covenants for title which they can give. Thus, where the trustee of a will is selling under a power of sale, it may be a good thing to obtain covenants for title from the beneficiaries entitled to the proceeds of the sale. For a trustee does no more than covenant that he has done no act to incumber, and from the beneficiaries you may get much more satisfactory covenants; but it does not seem that you are entitled to insist on their concurrence. (See *Cottrell* v. *Cottrell*.) If, however, the sale was made with the consent of the tenant for life, as required by the trust instrument, the purchaser is entitled to covenants for title from the tenant for life limited to his interest. (See *Re London Bridge*.) And when the vendor is a married woman, even if she can convey the whole legal and equitable fee without the concurrence of the husband, yet it is desirable to get him to join if he will do so, not only to confirm the estate, and so assure you that the wife has made no dealing with it in his favour, but also to obtain covenants for title from him; for the covenants of the wife will only bind her separate estate, though it is not necessary, as was the case prior to December 5th, 1893 (see *Palliser* v. *Gurney*; *Leake* v. *Driffield*; *Bonner* v. *Lyon*; *Braunstein* v. *Lewis*; and *Loibl* v. *Fraser*), for the plaintiff suing for breach of such covenant to satisfy the Court that the covenantor was possessed of separate estate at the date of the contract of such a character to induce the Court to consider that she contracted in reference to it. (See Married Women's Property Act, 1893, s. 1.)

(a) beneficiaries under a will;

(b) tenant for life;

(c) husband;

Again, when a mortgagee sells under his power of sale, though

(d) mortgagor.

you cannot insist on the concurrence of the mortgagor, it would be well to obtain it, so that he may give you a fresh set of covenants for title, and not leave you to depend on the assignment of those into which he has entered with the mortgagee.

Parties joined in order to affect them with notice.

Parties are not often in practice joined for the mere purpose of giving them notice of the deed, since the costs thereby occasioned would be out of proportion to the advantages derived by joining them, and direct notice by a separate instrument is more usually given. However, if the persons to whom notice of the assurance ought to be given in any case will join in the deed and acknowledge that they have received it, it will be useful, as enabling you on a subsequent sale to dispense with the necessity of having to give the purchaser proof of the service of notice.

2. *The Parties to whom the Conveyance is made.*

Conveyance to uses to bar dower.

In cases (which will at this date be few and far between) where your client has living a wife to whom he was married on or before the 1st January, 1834, he should take the conveyance in the form of uses to bar dower. That is, the conveyance should be made to him in fee to such uses as he shall by deed appoint, and in default of and until such appointment, and so far as any such appointment shall not extend to his use for his life, without impeachment of waste, and after the determination of that estate by any means during his lifetime to the use of a trustee during the life of the purchaser in trust for him, and after the determination of the estate so limited to the trustee to the use of the purchaser in fee simple. For such uses prevent his widow's dower attaching, since under them the purchaser never becomes legally seised in fee of the lands, though by virtue of the power of appointment conferred upon him he can, by the exercise of it, pass the legal fee to a subsequent purchaser, and in the meantime he is legally seised of the life estate, and has an equitable estate of inheritance in remainder.

Conveyance to partners.

When your clients are partners, purchasing the estate out of partnership assets, and for partnership purposes, the form of conveyance will depend somewhat on the circumstances of the particular case. If the property is purchased as a permanent

investment, then, with a view to keeping the fact of the partnership off the title deeds, it may be advisable to convey to them as tenants in common; but there is an objection to this course, viz., that should they wish to convey, then in case of the death of a partner, the concurrence of his heir-at-law or devisee, who may have no beneficial interest in the property, and whose concurrence may therefore be difficult to obtain, would be necessary (see *Hutton* v. *Lister*); moreover, in the case of a devise, the will might make a reference to the partnership, and so after all put the articles on the title. The more usual form of conveyance now, especially where the land is purchased temporarily, *e. g.*, for speculative purposes, is to the partners as joint tenants, upon trust for them, their executors, administrators, and assigns, as part of the estate and joint stock of the partnership, with a proviso that the survivors or survivor, &c., of them shall have full power to convey and give effectual receipts.

Another form the purchase deed may take is a conveyance by the vendor to a trustee on behalf of the partners, the deed subsequently declaring that the trustee is to hold the property for the partners as part of the capital or joint stock of their partnership business, in proportion to their several shares in the same. The object of this mode of conveyance is, by vesting the legal estate, to prevent the necessity of shifting it whenever a partner retires or dies, or a new partner is introduced.

Conveyance for the benefit of persons not parties.

Generally, as to parties taking an interest under a deed of indenture, the old rule was, that no person could take an interest who was not named as a party therein. But now, by 7 & 8 Vict. c. 76, s. 11, as re-enacted by 8 & 9 Vict. c. 106, under an indenture an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting the same, may be taken, though the taker is not named as a party.

Concluding warning.

We will conclude our remarks on this portion of our subject by warning you that you should take great care that the parties are all clearly described, so that no question may be raised on subsequent transactions as to their identity.

III. Recitals.

Recitals are divided into two kinds—*narrative* recitals, and *introductory* recitals. Narrative recitals relate to the previous dealings, &c. with the lands conveyed: while introductory recitals indicate the purpose of the deed in which contained.

Recitals should be sparingly used:

(1) because they may control the operative part;

Recitals should only be used sparingly, because they may do harm, by reason of the control they may have on the operative part of the deed, and on account of the doctrine of estoppel, which applies to them. As to the first point—the influence they may exercise on the operative part of the deed—if there is a discrepancy between the recitals and the operative words, the latter will prevail, if at least they are free from ambiguity; but if the operative clauses are ambiguous, then the recitals may be looked to for explanatory purposes. (*Jenner* v. *Jenner*.) They will not, as a rule, operate so as to supply a total deficiency in the operative part. (*Hammond* v. *Hammond*.) In one case (*Jenner* v. *Jenner*), where the recitals showed that a married woman concurred to bar her dower, but her name did not appear in the operative part of the deed or in the covenants for title, it was still held that the dower was effectually barred. But in *Young* v. *Smith*, where it was recited in a settlement that it was agreed that the after-acquired property of the wife should be subject to the terms of the settlement, whereas the following covenant to settle was made by the husband alone, it was held that the recital would not extend the covenant so as to include the after-acquired separate property of the wife.

and (2) because of the doctrine of estoppel.

As to the second part, the doctrine of estoppel by recital is grounded on the very old principle of law, that if a man makes a solemn statement in a deed he will be estopped or prevented from alleging afterwards anything contrary to that statement.

The law as to estoppel by recital.

Lord Coke thought that a recital could not have any effect by way of estoppel, because it was not a direct affirmation; but his conclusion was dissented from in *Bowman* v. *Taylor*, and in *Salter* v. *Kidley*. Holt, C. J., said, "A general recital is not an estoppel, but a recital of a particular fact is." The rule now is, that a recital in a deed will estop the parties to the deed and their privies, *i.e.*, persons claiming through them, from showing the

existence of a different state of facts from that which would appear from such statements. But to have this effect the recital must be clear and unambiguous (see *Heath* v. *Crealock*, and *General Finance Co.* v. *Liberation Building Society*); and a recital will not estop a party from giving evidence which explains the deed or shows the intention of the parties thereto. In fact, in estimating how far a recital operates by way of estoppel, the deed must be considered as a whole, in order to discover how far the parties intended to bind themselves by the recital (see *Morton* v. *Woods*); and in *Severn* v. *Clerk* it was said, "The recital of itself was nothing, but being joined and considered with the rest of the deed it was material." Again, a recital which only relates to matters foreign to the contract between the parties to the contract does not create an estoppel. (*Fraser* v. *Pendlebury*.) Nor will it estop when the element of fraud enters, or where the party executing the deed is under disability, *e.g.*, is an infant (see *Jones* v. *Frost*), or where the party, or someone through whom he claims, did not execute the deed containing the recital. Finally, a person is not estopped by his deed from denying a statement therein in a subsequent action between the parties not founded on the deed, but wholly collateral to it. (See *Fraser* v. *Pendlebury*, and *Ex parte Morgan*; see also *Onward Benefit Society* v. *Smithson*.)

Recitals used for various purposes: (a) for furnishing evidence;

Besides their use as means of estopping the parties from denying the statements made in them, recitals are used for various other purposes. Thus, considering the effect of the Vendor and Purchaser Act, 1874, s. 2 (2), that recitals in a deed twenty years old are evidence, and also the effect of sect. 3 (3) of the Conveyancing Act, 1881, as to recitals, they may be used for the purpose of being relied on as evidence on subsequent sales of the property; and considering the decision in *Bolton* v. *The London School Board*, that a recital in a deed twenty-four years old that the vendor was seised in fee, precluded the purchaser from requiring the vendor to carry the title further back, it would not be amiss to insert such a recital in every deed where possible. Some conveyancers, however, do not think that this decision can be supported, for it is at variance with the statutory rule, that the purchaser under an open contract is entitled to forty years' title, but unless and until some

court, having jurisdiction to do so, sets aside the decision in the case referred to, it must be regarded as law, and so binding on purchasers.

Again, recitals may be used to preserve a record of certain facts essential to the title, but which would not otherwise appear from the documents of title, *e.g.*, deaths, marriages, &c. The recital of these will prove very useful, as they will constitute a kind of index to a purchaser of the places where he may obtain the proper certificates of such facts, births, marriages, &c.

(b) for explaining the purposes of the deed.

Again, recitals may be used to explain what are the purposes which the parties intend to effect by the deed, and to explain the operative part of the deed, by stating all circumstances necessary to render its effect intelligible. (As to the effect of recitals on covenants for title, see *Page* v. *Midland Rail. Co.*, *et post*, p. 182.) And lastly, recitals may be used, when the deed in which they occur is effectual only by virtue of its complying with the terms of some other deed, to show that the terms have been duly complied with. Thus, where the deed is executed in pursuance of a power given by some previous deed, that previous deed should be recited, so as to show what formalities, if any, are required to be observed in the execution of the power; and by comparing the recital with the power as actually executed by the deed, it may at once be seen whether or no the requisite formalities have been duly observed.

Thus, while not advising you to omit recitals altogether, we would wish to impress on you the strong advisability of never using them unless there is some definite object to be attained in doing so. Brevity should be the ideal of the modern conveyancer, at least such brevity as is consistent with clearness, accuracy, and the attainment of the object with which the deed is to be executed.

IV. The Consideration.

Reasons for setting forth the consideration of a deed:

A deed is not void for want of a consideration. But there are several reasons why the consideration should always appear. The first reason depends on the doctrine of Equity, as to the raising of a use. If, before the Statute of Uses came into operation, A. enfeoffed land to B. without any consideration passing, then Equity considered that B. held the land to the

use of A. Now, when the statute came into being, the result was, that he who had the use was thereby clothed with the legal estate; so that in the above case there was a resulting use to A., and thus, being clothed with the legal estate by the statute, the result was, that the conveyance was inoperative and passed nothing, or at most was useful for "breaking the descent." But where a consideration was expressed, the equitable doctrine of a resulting use did not apply, so that B. in such a case would keep the legal estate in spite of the Statute of Uses. The arising of a resulting use may also be prevented by the introduction of an express use, and this in practice is generally effected by the habendum being made not merely unto the grantee and his heirs, but unto and to the use of the grantee and his heirs.

(a) to prevent a resulting use;

A second reason for stating the consideration is, that if it be not stated the deed will be presumed to be a voluntary one, and in this case it will be void as against certain outside persons. Thus, by 13 Eliz. c. 5, a conveyance made by one who is in debt at the time to such an amount that he is not able to pay his debts in full, will be void against his creditors, unless it is made *bonâ fide* and for valuable consideration. And formerly, by 27 Eliz. c. 4, a voluntary conveyance, not being in favour of a charity (*Ramsay* v. *Gilchrist*), of land could be defeated by a sale to a purchaser for value, and this even though the subsequent purchaser had notice of the voluntary deed; but this is no longer so, provided the voluntary conveyance was made *bonâ fide* without intention to defraud, owing to the provisions of the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21). Further, under the Bankruptcy Act, 1883, a voluntary deed is, for ten years at least, liable to become void on the bankruptcy of the grantor within that time, and is absolutely void as against the trustee if the grantor become bankrupt within two years after making it. As to the difficulties which surround a title when there is a voluntary deed upon it, see *Clarke* v. *Willott;* and *Briggs and Spicer, In re.* (*Ante*, pp. 47, 115.)

(b) to prevent it being deemed a voluntary conveyance;

Another reason for stating the consideration is, that by the Stamp Act, 1891, s. 5, you will be liable to a penalty of 10*l.* if, with intent to defraud, you do not fully and truly set

(c) to avoid penalties under the Stamp Act;

forth all facts and circumstances affecting the liability of the instrument to or the amount of *ad valorem* duty chargeable.

(d) to avoid the necessity of the indorsed receipt.

Besides these, another reason for setting forth the consideration and the receipt therefor in the body of the deed is, that by the effect of the Conveyancing Act, 1881, s. 54, such a receipt, in deeds executed after the commencement of the act (*i. e.*, after the 31st December, 1881), will operate as a sufficient discharge to a purchaser, the payer thereof, without a further receipt being indorsed. And again, by sect. 55 of the same act, the receipt in the body of the deed will (equally with the indorsed receipt), in deeds executed after the commencement of the act, in favour of a subsequent purchaser who has no notice that the money has not been paid, be sufficient evidence of such payment. And, moreover, as we shall see hereafter (*post*, pp. 191, 192), by sect. 56 of the same act, as read with sect. 17 of the Trustee Act, 1893, the receipt, whether in the body of or indorsed on the deed, will operate as an authority to the purchaser, &c. to pay the money to the solicitor who produces such deed.

(e) certain Acts require it to be set forth.

Lastly, we must remind you that the Bills of Sale Acts of 1878 and 1882 require the consideration for a bill of sale to be truly set forth in the bill, otherwise it is void. (See *post*, in chapter on Bills of Sale.)

Deeds are not void because consideration inadequate, except in cases—
(1) of fraud;
(2) of sales of reversions and expectancies;

Into the question of the adequacy of the consideration the court will not go, except in cases where fraud is alleged (*Westlake* v. *Adams*), and mere inadequacy is of no importance except where it is so gross as to amount to an indicium of fraud. (*Rice* v. *Gordon*.) But on the sale of reversions or expectancies by heirs and others, the old rule in a court of equity was that it must be shown that an adequate price was given, or else the sale might be set aside. (*Chesterfield* v. *Jansen*.) This rule, it must be borne in mind, is still in force, and is not abrogated by the provisions of the statute 31 Vict. c. 4, which merely provides that no *bonâ fide* purchase of a reversion made without fraud or unfair dealing shall be set aside merely on the ground of undervalue. (See *Tyler* v. *Yates*.) So that a prodigal who disposes of a reversionary interest may subsequently avoid the sale on the ground of undervalue, or rather of fraud, of which the undervalue is the index, and so may his heir on his death (*Evans* v. *Cheshire*); and this even though he be of mature age and a man

of the world, fully capable of understanding his own interest (*Bromley* v. *Smith*), though he proposed the sale and not the defendant, and though he was very pressing that the sale should be carried out. (*Croft* v. *Graham*.) In *Neville* v. *Snelling*, the doctrine of *The Earl of Aylesford* v. *Morris* was extended to the case where advances were made on hard terms, with a view to making the borrower's relatives repay to prevent the scandal of a bankruptcy, although the borrower was not an "expectant" in any sense in which that term is used.

(3) hard bargains.

V. Operative Words.

In perusing old deeds you will find that the conveyancers of those days were very liberal in respect of the quantity of words which they were wont to introduce into their documents, and particularly in the matter of the operative words in conveyances did they display their lavishness. Thus, in some deeds you will find that the conveying party in a deed was not content with merely "granting and conveying" the property, but would "grant, bargain, sell, alien, convey, release and confirm" it to the purchaser, and sometimes would say both that he had done so, and that "by these presents doth" do so. The reason for the employment of so many words was no doubt the idea that, if from any cause the nature of the assurance or of the property was such that some special words of conveyance might be necessary to pass the property, the conveyancer, by using all the operative words he knew, might at least be sure of including in his catalogue the one applicable to the circumstances of the case, and it was thought that if that certainty was secured, it mattered but little that the deed was open to the charge of surplusage; and seeing that deeds were paid for by the length, it is not surprising that the conveyancer was rather inclined to verbiage than otherwise. Merely reminding you that all the above words have their proper significance, and that they are each of them appropriate to special kinds of assurances, we shall pass on to the statute 8 & 9 Vict. c. 106, by which the word "grant" became the appropriate word to pass all hereditaments, corporeal or incorporeal; but the statute did not make the word indispensable, and any words which indicated an

Lavish use of operative words in old conveyances.

Grant is the proper operative word,

but not an indispensable one to convey land.

intention to grant would have been sufficient. (See *Haggerstone* v. *Hanbury*.) And sect. 49 of the Conveyancing Act, 1881, merely confirms this, when it enacts that in conveyances made before or after the commencement of the act, the use of the word "grant" shall not be necessary to convey tenements or hereditaments, corporeal or incorporeal. Formerly, if you wished to confer an estate in fee simple on the purchaser, you had to use the technical word "heirs;" and in the case of corporations (other than the crown and corporations aggregate) the word "successors," and to confer on him an estate tail, the words "heirs of his body." But now, by sect. 51 of the Conveyancing Act, 1881, a fee simple may be limited by using the words "in fee simple" without the word "heirs," and an estate tail by the words "in tail" without using the words "heirs of his body." But this statutory provision does not interfere with the necessity of using the word "successors" when conveying to a corporation sole other than the crown.

Provisions of Conveyancing Act.

VI. The Parcels.

Sometimes the parcels should be newly described.

It is generally advisable to take the description of the parcels from that which appears in the abstract; but should that be a very old one, and there be a chance that a verification of the admeasurements as therein given would be a matter of difficulty, it will be perhaps advisable to frame a new description founded on a new survey of the land. In such a case you should incorporate in the deed not only the new but the old description, and refer to the fact that the lands were lately held under the old description, otherwise a trouble in identifying the premises to the satisfaction of a purchaser may afterwards arise.

Faulty descriptions of parcels.

With reference to faulty descriptions of the parcels, we may remind you of the maxim, "*Falsa demonstratio non nocet*," *i.e.*, where the main description of the property is sufficiently clear and certain to put it beyond a doubt what is intended to be passed by the deed, a subsequent erroneous addition to this description will not prejudicially affect the first one. Thus, the adding to an otherwise clear description of erroneous circumstances as to the locality of the premises, or as to their occupation or otherwise, will not vitiate it. For example, A. grants

the farm of Blackacre to B., and subsequently describes it (contrary to the fact) as in the occupation of X.; this false circumstance will be considered as mere surplusage. Again, if A. conveys to B. all his meadow Blackacre, described as containing ten acres, whereas in fact it contained twenty acres, the whole twenty acres will pass to B.

The meaning of certain technical words:

If you use technical words, you should take care that you know their legal meaning, and employ them in their proper significance.

(a) Manor:

A Manor will pass all the demesne lands of the manor, and the freehold of the copyholds as well as the seignory; so also will an advowson appendant pass under this term, except when the conveyance is by the crown. (*Att.-Gen.* v. *Sitwell.*)

(b) Messuage;

A Messuage.—Under this word will pass a dwelling-house with the land attached.

(c) House;

A House.—This will include the curtilage and buildings forming part of or appertaining to it, and also a garden attached to it. (*Kerfield* v. *Seacombe, &c. Rail. Co.*)

(d) Farm;

A Farm.—This will pass the farm house and the land held therewith.

(e) Land;

Land.—This term includes houses and everything therein or permanently affixed thereto.

(f) Tenement;

Tenement.—This term includes lands and everything which may be the subject of tenure, whether corporeal or incorporeal, real, personal, or mixed.

(g) Water;

Water.—This word will only pass the right to the water, and a right of fishing therein, and not the land on which it stands. The proper word to use, if it is wished to pass the land as well as the water, is the word "pool," or to convey the land and describe it as "covered with water."

(h) Gateway.

Gateway.—It has been recently held that a demise of land with a right of gateway operates as a demise of the land covered by the gateway. (*Reilly* v. *Booth.*)

If the land abuts on a highway it theoretically extends to the centre line of the highway, and the portion of ground which extends into the highway will pass, although the plan referred to in a description of the property does not show that the boundary line of it extends so far. (*Berrige* v. *Ward.*)

How the description of

If after a general description you introduce qualifying words,

parcels is affected by the use of general words.

you must keep in mind the rule as to the effect which a qualification has as regards restricting the generality of a prior description. The rule is shortly as follows:—"If general words are preceded by a specification or enumeration of particulars, the general words will not be construed to signify anything of a higher nature or of more importance than, or of a different description from, what is before expressed." For example, if A. grants to B. all his plate and jewelry, "and other effects," the words "other effects" will only pass property of a similar nature to those first mentioned.

Mines, &c. pass without mention.

Fixtures, and timber whilst still growing, will pass without a separate mention; so also will mines and minerals; and if mines are to be excepted from the grant, an express reservation

Exceptions.

of them must be made. There are, however, exceptions to this rule; for instance, the mines do not pass unless they are expressly mentioned in purchases by railway or canal companies under their statutory powers (see 8 Anne, c. 20, s. 77; and *Errington* v. *Met. District Rail. Co.*); nor do they pass under a compulsory enfranchisement of copyholds, without the express consent of the lord. (15 & 16 Vict. c. 51, s. 48.)

VII. General Words.

Legal appurtenances pass under a grant of land.

By a simple grant of land, not only the land itself, but all the means of enjoying it, and all its incidents and accessories, will pass by the mere force of the grant itself, the maxim being *Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit.* So that all easements and privileges *legally* appurtenant to the land itself will pass without being expressly

What are legal appurtenances.

mentioned. Easements and privileges are said to be legally appurtenant when they are not naturally or originally appendant to the land, *i. e.*, are not natural methods of enjoying, or modes of using the land, but have been annexed to the land or made part of the means by which enjoyment of the lands is obtained, either by some express grant or by prescription, or by long user. As examples of privileges legally appurtenant may be given: rights of way over another person's land, or the right to take water therefrom, and similar rights, known as rights of common, or *profits à prendre.* These rights will pass with the land with-

out special mention. But there are other appurtenances to lands which are not legally appurtenant to them. There are some easements, *profits à prendre*, or other rights, which, though not appurtenant to the land, have been enjoyed with, or reputed or known as part and parcel of, the land itself. Easements of this description will not pass by a simple conveyance, without being expressly mentioned, and it is to pass these that general words are employed. But the necessity of using any general words at all is now in most cases done away with by the Conveyancing Act, 1881, ss. 6, 7, which supplies to all conveyances a sufficiently comprehensive list of general words to pass all kinds of appurtenances, legal or otherwise. The Conveyancing Act does not include mines and minerals in the general words enumerated by it; but, as we pointed out above, with a few exceptions, these will pass without the need of specially mentioning them.

Certain easements do not pass without mention; except in deeds executed since 31st Dec., 1881.

In *Peck* v. *The London School Board*, there was a sale of lands "with the appurtenances," and it was held that the purchaser was only entitled to have inserted in the conveyance such general words as he would have been entitled to before the Conveyancing Act, 1881; and as far as the general words incorporated by sect. 6 of that Act in any conveyance are wider than the words he could, under such a sale, have previously insisted upon, they must be narrowed down. (See also *Baring* v. *Abingdon*.)

Sale "with the appurtenances."

The "All the estate" clause was always inserted in deeds after the general words, but practically it was of no use. And now by the Conveyancing Act, 1881, s. 63, as to conveyances made after the commencement of the act (*i. e.*, after 31st December, 1881), it will not be necessary to expressly insert it, as it is made a matter of implication to every such conveyance.

The "all estate" clause is unnecessary.

VIII. Exceptions and Reservations.

If you wish to except or reserve anything out of the grant, you must specially mention it. There is a distinction between an exception and a reservation: an exception is the holding back, as it were, a part of the thing granted, so that the exception must be a part of the thing granted, and, consequently, must be *in esse* at the time of the grant; but it must be of a

The distinction between reservations and exceptions.

part only, and not of the whole, of the thing granted; and, moreover, it must not be repugnant to the grant, so that if you demised a house and shops, excepting the shops, the exception would be void as being repugnant.

Express reservations.

A reservation, on the other hand, can only be of something new issuing out of the thing granted: thus, a rent is said to be reserved. Strictly speaking, you cannot reserve to yourself anything that does not issue out of the land: thus, it is not correct to say that you reserve a right of sporting over the lands; but in such a case the reservation is allowed to operate as a re-grant by the purchaser of the right. (See *Wickham* v. *Hawker*, and *Hooper* v. *Clarke*.)

Implied reservations.

Reservations are, in some cases, implied by law: thus, where you retain a portion of the property and sell the rest, the law will presume, in the absence of anything in the conveyance to negative the presumption, a reservation of all such rights and easements over the part conveyed as are essential to the due enjoyment of the part which you retain, *e.g.*, rights of way, support, &c. (see *Pearson* v. *Spencer*; *Richards* v. *Rose*; and *Davis* v. *Sear*); but where the owner of the house and lands adjoining sells the lands and retains the house, there is no implied easement of light granted to him over the lands sold, though if he sold the house, and retained the lands, the purchaser would obtain by implication an easement of light over the lands retained by the vendor. (See *White* v. *Bass*; *Taylor* v. *Allen*; and *Phillips* v. *Low*.)

IX. The Habendum.

The function of the habendum.

The function of the habendum is to mark out the estate, *i.e.*, the amount of interest, taken by the purchaser. Thus, land may be granted to A. and his heirs, to hold unto and to the use of A. and his heirs.

Conflict between operative words and habendum.

When differences occur between the limitation following the words of grant, and the limitation in the habendum, the question will arise which is to prevail, the interest as created by the operative words, or that created by the habendum? The rule is, that nothing can be added by the habendum to what has been granted by the premises: so that if there is a grant of the

field known as A., habendum, "together with B.," the conveyance will not pass B. as well as A. Indeed, the habendum is considered to be of but secondary importance, and whenever it is inconsistent with the grant in the premises it will simply be void. So that it cannot abridge the estate created by the premises; and if land is granted to A. and his heirs, habendum to A. for life only, the habendum will have no effect, and A. will take the whole fee simple. But this must be distinguished from the case where the habendum may be considered as not being repugnant to the grant, but as explanatory of it. Thus, if an estate is granted to A. and his heirs, habendum to A. and the heirs of his body, here the habendum will be considered as used to explain the sense in which the word "heirs" is used in the premises, and A. will take only an estate tail. A mere discrepancy of names between the premises and the habendum is of no importance. The "tenendum," which is generally coupled with the "habendum," is a clause which is at the present time quite superfluous. Before the passing of the *Quia Emptores* Statute (18 Edw. 1), this clause was used to show of whom the feoffee was to hold, and afterwards, and up to the passing of 12 Car. 2, c. 24, its use continued to show by what tenure the lands were held, *i.e.*, whether in free socage or in knight's service.

Tenendum clause now useless.

X. Covenants.

Following the habendum come the covenants. These may be divided into two large classes—covenants by the vendor and covenants by the purchaser. The first class will include the covenants for title, and, in addition to these, there will be other covenants by the vendor in special cases; and in the second class there will be covenants by the purchaser in the nature of indemnities to the vendor against incumbrances and charges on the land, &c., and covenants by which the purchaser restricts his full *primâ facie* rights to the enjoyment of the land.

Two classes of covenants:

(1) vendor's covenants;

(2) purchaser's covenants.

Vendor's Covenants.

Covenants are sometimes implied by the use of particular words in the operative part of a deed; but in most cases it has

Implied covenants.

been the practice not to rely on implied covenants, but express ones have been inserted. Covenants for title, however, are *impliedly* annexed to all deeds under the Conveyancing Act of 1881, and these are constantly relied on in practice. When express covenants are inserted, they qualify the generality of the implied ones, so that they will not extend further than the express covenants.

Statutory provisions as to the implication of covenants.

Before the statute 8 & 9 Vict. c. 106, exchanges and partitions at common law implied conditions or warranties of title; and the words "give" or "grant" in other conveyances implied similar warranties; but by this statute those assurances are not in future to imply any condition in law, and those words are not to imply any covenant, except so far as they may do so by virtue of some act of parliament. Under this qualification covenants will still be implied by the use of the word "grant" in conveyances of land by promoters under the Lands Clauses Consolidation Act, 1845. In bargains and sales of land in the East and North Ridings of Yorkshire, the words "grant, bargain, and sell," implied covenants for title; but the acts which produced this effect are now repealed by the Yorkshire Registry Act of 1884, and there are no provisions therein on the subject of implied covenants. Further, the word "grant" implies covenants for title in conveyances *to* the Governors of Queen Anne's Bounty. (1 & 2 Vict. c. 20, s. 22.) Again, the word "demise" in a lease implies a covenant for quiet enjoyment; but as it is an absolute covenant, and does not bind the lessor after assignment, its operation is usually (in the interests of the lessee as well as of the lessor) excluded by inserting an express covenant for such enjoyment. Again, when a lease for years is made "yielding and paying" a certain rent, these words create a covenant for the payment of the rent; but this implied covenant, too, is usually excluded by the insertion of an express covenant, as it does not bind the lessee should he assign the premises. (Vide *post*, Part III.)

No covenant implied from the word "grant."

Exceptions.

Covenants implied from—

(1) word "demise";

(2) words "yielding and paying."

Covenants generally, as affected by the Conveyancing Act, 1881.

Sects. 10 to 12 of the Conveyancing Act, 1881, make certain provisions as to covenants in leases. These you will find referred to in the chapter on Leases (*post*, Part IV.). Sects. 58, 59, 60 and 64 relate to the construction of covenants; sect. 58 relates to the *benefit* of a covenant, and enacts that a covenant relating to

land of inheritance shall be deemed to be made with the covenantee, his heirs and assigns, and have the same effect as if his heirs and assigns were expressed; and a covenant relating to land not of inheritance is to be deemed made with the covenantee, his executors, administrators, and assigns, and have the same effect as if they were expressed. This only relates to covenants made after the commencement of the act (1st Jan. 1882). Formerly, the obligation and the benefit of a real covenant attached upon the successive owners of the property, but otherwise the covenantor's heirs were not bound by, and the covenantee's heirs could not take advantage of, the covenant unless named. This section only applies to covenants relating to land, and its effect is, that in such covenants, if they relate to estates of inheritance, the words "heirs and assigns," usually inserted after the covenantee's name, may be with safety omitted, since they are supplied by the act. And in covenants relating to estates *not of inheritance*, the words "executors, administrators, and assigns" may now be safely omitted after the covenantee's name. With regard to personal covenants this was always so; that is, the personal representative of the covenantee or his assigns could enforce the covenant, whether named or not.

Heirs and assigns, executors, administrators and assigns of covenantee, need not be named.

The section does not extend to incorporate the *heirs and assigns of the covenantor*. But by sect. 59, a covenant, though not expressed to bind the heirs, will bind the heirs and the real estate as well as the executors, administrators, and personal estate of the covenantor. This section does not affect the covenantor's assigns, who will not be bound by the covenant if it is an affirmative one, and if it is a restrictive covenant they will only be bound if they have notice of it, and this whether they are named or not. Thus, if A. sells land to B. in fee simple, and B. covenants not to build in a certain way, and B. then sells to C., C. will be bound to abstain from building in ~~defiance~~ of the covenant if, as would probably be the case, he has bought with notice of B.'s covenant; for this is a restrictive covenant, and restrictive covenants in equity bind subsequent purchasers, lessees, &c., with notice under the *Tulk and Moxhay* rule, although such covenants do not at law run with the land. (See *Tulk* v. *Moxhay; Austerberry* v. *Corporation of Oldham*.) But if A. sells lands to B. in fee, and B. cove-

Heirs of covenantor need not be named.

Liability of covenantor's assigns.

nants that he will build a house on the lands within a limited time, and B. sells the lands to C., and the house is not built within the time agreed upon, A. cannot proceed against C. for breach of the covenant, even though C. had notice of it, for this is an affirmative covenant, and A. must look to his remedy against B. (*Heywood* v. *The Brunswick Benefit Building Society; Hall* v. *Ewen and McNeff.*) With regard to affirmative covenants entered into by a lessee, as distinct from a purchaser of the fee simple of property, the rule is different, since such covenants bind subsequent assignees of the lease owing to the privity of estate which exists between them and the landlord (the covenantee), provided the lessee covenants expressly for his assigns in a case where the covenant is to do something new on the land demised, *e.g.*, to build a wall. This, by the well-known rule in *Spencer's case*, is not applicable to covenants by purchasers of the fee simple, but only to covenants entered into by lessees. (See *post*, p. 185.)

As to covenants with two or more persons.

Sect. 60 will enable you to dispense with the words "or the survivor or survivors of them, or the executors or administrators of such survivor, or their or his assigns," so usually found in covenants with two or more jointly, and especially in mortgages to trustees who advance money on a joint account.

Sect. 64 provides that in a covenant, proviso, or other provision implied in a deed by virtue of the act, words in the singular or plural number shall include also the plural or singular respectively, and the masculine gender when used shall also include the feminine. This provision is an imitation of 13 & 14 Vict. c. 21, which made similar provisions with regard to expressions contained in all acts of parliament. But that act applied to the expressions used in the words of the acts themselves, whereas sect. 64 applies to expressions occurring in *covenants*, &c., which are to be implied in deeds by virtue of the act.

Usual covenants by ordinary vendor,

When the vendor is the absolute owner of the land, and the land is freehold, he usually enters into four covenants for title: these are:—1. A covenant that he has good right to convey. 2. That the purchaser and persons claiming under him shall enjoy possession of the land without any interruption from him or persons claiming through him. 3. That the purchaser shall hold free from incumbrances created by him or by persons through whom he claims, or claiming under him otherwise than

by a purchase for value. 4. That he or any one through whom he derives title, otherwise than by a purchase for value, will do everything that may be necessary for the further or more effectually assuring the premises to the purchaser. These covenants you will see are not absolute, but only extend to the acts or omissions of the vendor and those claiming by, through, under, or in trust for him (see hereon *David* v. *Sabin*), and of such persons under whom the vendor claims as have not themselves entered into proper covenants, *i.e.*, persons who have not acquired the estate by purchase; a purchase here not including a devise or a marriage settlement. If the subject-matter of the conveyance be leasehold property, the vendor further covenants that as far as any acts or omissions done or omitted by him, &c., or by persons through whom he claims, are concerned, the lease is a valid and subsisting one, and that the rent has been paid, and the covenants and conditions have been performed up to the date of the conveyance. If the vendor is merely a trustee, a mortgagee, the personal representative of a deceased person, or the committee of a lunatic not so found, the only covenant for title entered into is, that he personally has done nothing to incumber the estate. A trustee cannot be compelled to enter into any other covenant, not even a covenant for further assurance. (*Worley* v. *Frampton*.)

are qualified, not absolute.

Usual covenant by trustee-vendor.

Formerly, these covenants for title were set out *in extenso* in the conveyance, but by virtue of the Conveyancing Act, 1881, they may, in future, by the use of appropriate words, be omitted altogether. For by sect. 7 of that act, in conveyances made after the act, the usual covenants for title will be implied, *inter alia*, in conveyances for valuable consideration, whether of freehold or leasehold property, and in deeds conferring a right to admittance to copyhold or customary land, when the party conveying is the beneficial owner, and is expressed to convey as such in the conveyance, or is a trustee, mortgagee, the personal representative of a deceased person, or the committee of a lunatic not so found, and is expressed to convey in such character, or where the person who is the beneficial owner, as such beneficial owner directs some other person to convey (in which case the covenants will be implied on the part of the person giving the direction). And sub-sect. 3 of this section is framed to meet

Conveyancing Act now supplies usual covenants.

the special case of a husband and wife both joining in the conveyance, and both conveying expressly as beneficial owners. Here the wife is placed in the same position as a person expressed to be conveying by the direction of another person, so that there will be—(1) (as the wife expressly conveys as beneficial owner) a set of covenants for title by her binding her separate estate; (2) (as the husband expressly conveys as beneficial owner) a set of implied covenants for title by him alone; and (3) (as he is a person expressly giving directions as beneficial owner to another person who conveys at his request) another set of covenants on his part extending to the acts of the wife, and of the persons through whom she claims. These implied covenants may be varied or extended, and in such a case they will operate as if the variations or extensions had formed a part of the covenants as implied by the act: but the implied covenants are so comprehensive that it will seldom be necessary to alter them in any way.

How far these implied covenants extend.

On whom they are binding.

As to the burden of these covenants—it will lie on the person, if one, and if there are several, then on each of the conveying persons as far as regards his share in the property. And under sect. 59, as we have seen, the covenants will impliedly bind the heirs and real estate of the covenantor, as well as his executors and administrators, and his personal estate.

With whom deemed made.

These covenants will be impliedly entered into with the person to whom the conveyance is made, if one, and if to two or more, then with those persons jointly; and if it is made to tenants in common, the covenants will be with each of such persons. Moreover, the benefit of these covenants will go with the estate and interest of the covenantee, and be enforceable by every person in whom that estate or interest, or any part thereof, is from time to time vested, that is to say, they will run with the land.

Whom they benefit.

The benefit of covenants for title runs with the land for the benefit of subsequent purchasers. Thus, if A. conveys lands to B. and gives him covenants for title, and B. sells the lands to C., and C. is disturbed by reason of A.'s title being defective, C. can sue A. for breach of the covenant for quiet enjoyment given by A. to B., and this whether the covenant for title by A. was given in express terms or implied under the Conveyancing Act,

1881, s. 7, by reason of A. having conveyed, and been expressed to convey, "as beneficial owner." (See *David* v. *Sabin*.)

There are some special cases of covenants for title which you should notice. Thus, when trustees are selling with the consent of the tenant for life, the latter will give the usual covenants for title; but they will be limited, as regards the reversion, to the acts of himself and persons claiming under him. (See *Earl Poulett* v. *Hood*.) When an incumbrancer releases the estate from his charge, he will merely covenant that he has done no act to incumber. When the vendors are tenants in common, the covenants are limited to their several shares; but if they are joint tenants, they sometimes covenant jointly, and sometimes jointly and severally. And their covenants are restricted to the extent of their several interests. Again, sometimes when trustees of a will are selling under a trust to pay debts, &c., and to divide the residue among certain persons who are all *sui juris*, these *cestuis que trusts* sometimes enter into covenants for title, but it does not seem to be an invariable practice for them to do so. Finally, when the vendor is the crown or a person selling to a company under compulsion by the Lands Clauses Consolidation Act, 1845, there will be no covenants for title by the vendor at all.

Some special cases:
(a) when trustees sell;
(b) on release of incumbrance;
(c) when co-owners sell;
(d) when crown sells.

We will take the opportunity of mentioning here two or three examples of acts or omissions which amount to breaches of the covenants for title. A covenant for good right to convey will be broken immediately upon the execution of the deed, if the covenantor has not a good right to convey. (See *Raynolls* v. *Woolmer*.) So that the time for suing on the covenant (twenty years, see 3 & 4 Will. 4, c. 42) will run against the purchaser from the date of the conveyance. And where the covenant is that the covenantor and another party to the deed have in them a good right to convey, and it turns out that that third party is incapable of conveying, the covenant will be broken. (*Nasher* v. *Ashton*.) As to the covenant for quiet enjoyment—in order to constitute a breach of this, there must be some disturbance, but actual eviction is not necessary. Thus, where after the sale a decree was made in a suit in Chancery that the land sold was subject to a right of common, it was held that the decree alone, without any entry or actual disturbance of the purchaser, did

Some examples of breaches of covenants for title:
(a) good right to convey;
(b) for quiet enjoyment;

not amount to a breach. (*Howard* v. *Maitland.*) Nor will the covenant be broken by a wrongful eviction by a stranger, but it will be so by such an eviction by the vendor or someone who claims through him. The time for suing (twenty years) under this covenant runs from the time of the disturbance, and not from the execution of the deed—a reason why this covenant is required, as well as the covenant for good right to convey, which of course implies that the purchaser will not be disturbed.

(c) free from incumbrances;

Under a covenant against incumbrances by an heir-at-law selling his expectancy, it has been recently held that he is not obliged to give an indemnity against succession duty. (*Re Langham Hotel Co.*)

(d) for further assurance.

As to the covenant for further assurance, if a bad title be sold, the vendor under this covenant can be called upon to convey such title as he afterwards acquires, even though he acquires it by purchase for valuable consideration (see *Langford* v. *Pitt*); and this covenant will be broken by a refusal to levy a fine to complete the title, or to satisfy a judgment or other incumbrance. (*King* v. *Jones.*) And in *Fain* v. *Ayers*, it was suggested that under this covenant a deed of covenant to produce title deeds might be successfully insisted on, though a doubt was expressed on the point. (See *Hallett* v. *Middleton.*)

Construction of covenants.

Lastly, we would refer you to the quite recent case of *Page* v. *The Midland Ry. Co.*, in which the Court of Appeal laid it down that covenants for title must be construed literally and without importing into them any exception which the parties themselves had not introduced by express words, but which exception might be gathered from the recitals, and in so holding overruled *Hunt* v. *White.*

Purchaser's Covenants.

Some cases in which a purchaser enters into covenants:

In certain cases the purchaser must enter into covenants with the vendor: thus, if the property entails certain liabilities and burdens on its owner, the vendor who sells it is entitled to covenants from the purchaser that he, the vendor, shall be indemnified from them. (*Moxhay* v. *Inderwick.*)

(a) sale of an equity of redemption;

And on the sale of an equity of redemption, as this entails on the purchaser the liability to pay the mortgage debt and interest, he in practice always expressly covenants to indemnify the vendor therefrom (*Waring* v. *Ward*), though such a covenant is implied. (See

Ashby v. *Jenner*.) Again, on the assignment of leaseholds by the original lessee, the assignor remains liable to pay the rent and to perform the covenants and conditions of the original lease, so that the assignee must indemnify him against breaches of covenants in the lease committed by any assignee during the continuance of his own term. (*Moule* v. *Garrett*; and see *post*, p. 209.)

(b) sale of a lease;

Where a reversion which the vendor derived through the death of some person dying after 19th May, 1893, and so is subject, when the reversion falls in, to succession duty, is sold, if the arrangement is that the purchaser is to bear the duty, he must covenant to indemnify the vendor, since succession duty is a debt due from the successor as well as a charge on the lands. And if the vendor is to pay the duty he must covenant to do so, and indemnify the purchaser. In practice the obligation is generally thrown on the purchaser, but in the absence of agreement it would fall on the vendor.

(c) sale of a reversion;

Where the vendor only sells part of this property and retains some land adjoining the part sold, and desires to protect his remaining property from being depreciated in any way by acts of the purchaser, he may require the purchaser to enter into covenants restricting his full legal right to use the land in any manner he thinks fit: in fact, to enter into what are known as restrictive covenants.

(d) sale of estate in lots. Restrictive covenants; when required.

On the construction of covenants like these, and on the points as to whom they will bind, and who is entitled to the benefit of them, there have been many decisions. The result of them may be shortly stated as follows:—They are, in the first place, covenants in gross, and do not run with the land. (See *Kepple* v. *Bailey*.) But a covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to bind subsequent purchasers at law (*Tulk* v. *Moxhay* and *Patman* v. *Harland*); and, further, such a covenant, though not running with the land, and though the assigns be not expressly bound, will nevertheless bind such assigns as have notice of it. (*Wilson* v. *Hart*.) Nor will a purchaser be able to claim exemption from a restrictive covenant on the ground

Do not run with the land;

but bind subsequent purchasers with notice.

that, not having investigated the title, he has not had notice of it, when a proper investigation would have disclosed it. (*Nichol* v. *Fenning* and *Patman* v. *Harland*.) And the vendor can sue in respect of such restriction even after he has parted with the estate. (See *Spencer* v. *Bailey*.) And it has been decided that where there is a lease of a public-house, and a covenant to purchase beer from one brewer only, both for that public-house and for another one held under a different landlord, such a covenant will bind an assignee of the second public-house if he has notice of it. (*Luker* v. *Dennis*.)

Who can take advantage of restrictive covenants.

As to the persons entitled to take the benefit of a restrictive covenant, to enable the assignee to take such benefit, there must be something in the deed to define the property for the benefit of which it was entered into. Thus, where the owners of an estate sold part of it to the defendant, who covenanted with them, their heirs and assigns, restricting his right to build, and the owners then sold the remainder of the estate to the plaintiff, there being no reference in the latter conveyance to the restrictive covenants, it was held that the plaintiff was not entitled to restrain the defendant from building in contravention of the covenant. (*Rennals* v. *Cowlinshaw*.) Nor will the benefit pass unless the purchaser has notice of the covenant. Thus A., the owner of two adjoining plots of land, leased one plot to B., who covenanted not to build in a certain way, and afterwards leased the other plot to C., who entered into similar covenants with A. B. afterwards, with A.'s approval, built so as to contravene the covenant and darken C.'s windows. C. then brought an action to restrain him from committing a breach of the covenant with A., but it was held that he was not entitled to relief, as the covenant did not enure to his benefit, it not being mentioned in the lease to him. (*Master* v. *Hansard*, and *Keats* v. *Lyon*.) And if a vendor puts up property for sale in lots, and the conditions provide that restrictive covenants shall be entered into by each of the purchasers, the purchaser of one lot can only proceed against the purchaser of another lot for breach of a restrictive covenant if, at the time of the purchase, it was the intention that such covenants shall be enforceable by the various purchasers and their assigns *inter se*. (*Nottingham Brick Co.* v. *Butler*; see *Harrison* v. *Good*; and see *Collins* v. *Castle*, where the sales of the lots had taken place at different times, when sometimes the restrictions had been imposed and

sometimes not, and when the vendors had retained part of the estates themselves; and the decision in *Nottingham Brick Co.* v. *Butler* was followed. See *Shepherd* v. *Gilmore*; *McKenzie* v. *Childers*; *Martin* v. *Spicer*; *Tyndall* v. *Castle*; see also *Birmingham District Land Co.* v. *Allday*, where a vendor put up building land in lots subject to restrictive covenants, and the court held it was a question of fact whether the restrictions are only between him and the purchaser of each lot or for the common advantage of different purchasers. See also *Tucker* v. *Vowles*.)

Positive covenants by purchaser do not run with the land, nor bind purchasers even with notice.

The above rule, however, only applies to restrictive covenants enforceable against the land, and not to positive or affirmative covenants, *e.g.*, a covenant by a purchaser of the fee simple that he will erect a dwelling-house on the land, for such a covenant is one *in gross* only, *i.e.*, it is *personal* to the covenantor, and subsequent purchasers are not bound, even though they may have notice of it. (See *L. & S. W. Rail. Co.* v. *Gomm*; *Heyward* v. *Brunswick Building Society*; *Hall* v. *Ewen and McNeff*; and see *ante*, pp. 177, 178.)

Vendor retaining deeds formerly covenanted to produce and keep safe;

Turning now to the custody of the deeds. Formerly, when the vendor was entitled to and did retain the deeds relating to the estate, he had to enter into covenants with the purchaser for the production of the deeds when called for, and for their safe custody in the interim. When the vendors were trustees, the general covenant to this effect was restricted so as to prevent them from incurring any personal liability, and each bound himself only so long as he had the actual custody of the deeds.

but now gives Acknowledgment and Undertaking.

For this covenant, however, the Conveyancing Act, 1881, s. 9, substitutes a form of agreement, called an Acknowledgment of the right to production, supplemented by an Undertaking for the safe custody of the deeds.

Obligations of acknowledgment.

The obligations imposed by an acknowledgment are obligations towards the person entitled to require production:

I. To produce the documents for inspection by him or any one authorized in writing by him upon his request in writing:

II. To produce the documents at any trial, &c. in the United Kingdom, on any occasion on which production may be properly required:

III. To *deliver* to him true copies or extracts attested or unattested of and from such documents.

The person who requires production or copies as above must bear the expenses, and the acknowledgment will not confer any right to damages for loss or destruction of or injury to the documents from whatever cause. A summary way of enforcing these obligations is provided for by sub-sect. 7, which empowers the person for whose benefit the acknowledgment is made to apply to the Chancery Division by summons in chambers for production of the documents, or the delivery of copies thereof or extracts therefrom to the person to be benefited or someone on his behalf. The acknowledgment when given operates to satisfy any liability to give a covenant for production and delivery of extracts or copies of documents.

How enforced.

On whom binding.

The acknowledgment binds the documents in the possession of the person who retains them, and in the possession or control of every other person having possession or control of them from time to time, but so long only as each person has the possession or control thereof. These persons must specifically perform the obligations imposed on them by the acknowledgment, except when prevented by fire or other inevitable accident. The obligations imposed by the acknowledgment are to be performed on the request in writing of—

1. The person to whom the acknowledgment is given:
2. Any person (except a lessee at a rent) having or claiming any estate, interest, or right through or under that person, or otherwise becoming through that person interested in or affected by the terms of the documents to which the acknowledgment relates:
3. The nominees of either in writing.

Obligations of undertaking.

The acknowledgment, as we have seen, does not give any right of action for loss or destruction of the documents, from whatever cause arising. Accordingly the act provides that on a person who retains possession of documents giving to another an *undertaking* for safe custody of such documents, the undertaking shall oblige—

(a) The person giving it; and

(b) Every person having possession or control of the documents from time to time,

(but only so long as each person has possession or control of the documents,) to keep the deeds mentioned in the undertaking safe, whole, uncancelled, and undefaced, unless prevented by fire or other inevitable accident.

Summary application in chambers in case of loss of documents, &c.

The section also provides (sub-sect. 10) a summary mode of applying in chambers in the Chancery Division for the assessment of damages for the loss, destruction or injury to any documents included in an undertaking, and empowers the court to direct inquiries as to the amount of damages, and to order payment thereof by the person liable. Lastly, note that the section only applies if and so far as a contrary intention is not expressed in the acknowledgment or undertaking, and only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of the act.

Acknowledgment or undertaking may be in separate document.

The acknowledgment or undertaking may be incorporated in the conveyance or may be included in a separate instrument. If the latter course is adopted, the question of what stamps the instrument is to bear will arise: there is no provision in the act concerning stamp duty, and probably an acknowledgment alone need pay no duty. (Vide *Meek* v. *Bayliss*.)

The position of trustees.

It has been contended that trustees who retain title deeds should only give an acknowledgment, and should refuse to give the undertaking. For our part, we have never seen how this contention can be supported, and as the acknowledgment standing alone gives no right to damages if the deeds are not produced, the acknowledgment without the undertaking would be of little avail, and in practice, acting for a purchaser from a trustee, we consider that you should insist upon at least a qualified undertaking; that is to say, an undertaking that if, while the deeds, &c., are in the trustee's personal custody, as distinguished from the custody of his solicitor or agent, and are lost or destroyed, he will be liable for such loss, &c. Of course you could not do so if, by the conditions of sale, it had been provided (as is the case sometimes, though we ourselves consider the insertion of such a condition unjustifiable) that the purchaser should have an acknowledgment only.

On a sale in lots.

In a case where an estate is sold in lots, if the conditions are silent, the purchaser who pays the most money will be entitled to the custody of the title deeds, and when the conditions are express

upon the question who shall have the title deeds, they generally give the title deeds to the purchaser who pays the most money; but if, as sometimes, they provide that the purchaser of the "largest lot" shall have the deeds, he who buys the actual largest lot offered in superficial area will be entitled to the deeds, even as against a purchaser of several lots whose aggregate area is larger than that of the largest lot sold. The purchaser who gets the deeds appears to be a person "retaining" them within sect. 9 of the Conveyancing Act, and so will give to each of the other purchasers an acknowledgment of his right to production, and an undertaking for safe custody.

When the acknowledgment and undertaking are not included in the conveyance, but are given in a separate writing, such writing should be stamped with a 6*d.* stamp.

When the deeds are not "retained" by the vendors (*e.g.*, when they are in the possession of a mortgagee subject to whose rights the property is conveyed), and the purchaser will not be entitled in equity to their production (see 37 & 38 Vict. c. 78, s. 2), the vendor must give to the purchaser a covenant to produce the deeds in the usual form. (See *In re Purssell and Deakin's Contracts.*)

The following is a copy of the form of a purchase deed given in the Fourth Schedule to the Conveyancing Act, 1881:—

Conveyance on Sale.

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of the 1st part *B.* of [*&c.*] and *C.* of [*&c.*] of the 2nd part and *M.* of [*&c.*] of the 3rd part WHEREAS by an indenture dated [*&c.*] and made between [*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in fee simple by way of mortgage for securing £ and interest and by a supplemental indenture dated [*&c.*] and made between the same parties those lands were charged by *A.* with the payment to *B.* and *C.* of the further sum of £ and interest thereon AND WHEREAS a principal sum of £ remains due under the two before-mentioned indentures but all interest thereon has been paid as *B.* and *C.* hereby acknowledge NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ paid by the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those two sums making together the total sum of £ paid by *M.* for the purchase of the fee simple of the lands hereinafter mentioned of which sum of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum of £ *A.* hereby acknowledges the

payment and receipt in manner before mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as beneficial owner hereby convey and *A.* as beneficial owner hereby conveys and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple discharged from all money secured by and from all claims under the before-mentioned indentures [*Add, if required,* And *A.* hereby acknowledges the right of *M.* to production of the documents of title mentioned in the Schedule hereto and to delivery of copies thereof and hereby undertakes for the safe custody thereof].

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

CHAPTER VIII.

THE COMPLETION OF THE PURCHASE.

I. The Execution of the Deed.

Reading over. As a rule, the deed ought to be read over to the parties to it; at all events, they ought to be acquainted with its contents or purport. And if a party to the deed cannot read, it should be read to him, and if it be falsely read it will be void, at least so far as it was misread; but if by collusion it be purposely read falsely in order to render it void, it will be valid.

Signature. It is a moot point whether signature is necessary; but when the case comes within the Statute of Frauds the better opinion would seem to be that it should be signed. In practice, deeds are always signed. On the other hand, sealing is without doubt an essential formality to the deed; but any kind of seal will do, and the mere touching of a seal which has been previously affixed is sufficient, and is usually adopted in practice.

Delivery: Again, delivery of the deed is essential: it may be either actual or virtual, or both.

(a) actual; Actual delivery is where the deed is actually delivered over by the party executing it to the other party.

(b) virtual; Virtual delivery is where he uses words to the effect that he delivers it as his act and deed, and this will be effectual even although he retains possession of the deed.

(c) as an escrow. A deed may also be delivered as an escrow, *i. e.*, to take effect conditionally only. In this case it should properly be delivered to some third person, with words importing that it is to be delivered to the proper person on such-and-such a condition or at such-and-such a time. But even where the deed is executed in the usual way, yet if it is delivered on a condition which suspends its operation to some future time or event, it will operate as an escrow. (*Watkin* v. *Nash*.)

Witnesses not ordinarily necessary to the validity of a deed.

Further, witnesses do not seem to be essential to the validity of a deed unless there is some particular statute or contract which requires witnesses, as, for example, under the Mortmain Acts, or where a deed of appointment under a power is required to be attested in some particular way. But in practice the conveyance is usually attested by one or two witnesses, so as to render proof of the due execution of the deed an easy matter in future.

Execution of deed in purchaser's presence.

Previously to the Conveyancing Act, 1881, it was an unsettled point whether or not the purchaser was entitled to have the deed executed by the vendor in the presence of the purchaser or of his solicitor. The purchaser's right appears to have depended on the circumstances of each case, and it was for a jury to decide whether or not the circumstances were such as to make it reasonable that his demand should be complied with. (*Viney* v. *Chaplin*; *Essex* v. *Daniell*.) The 8th section of the above act sets this question at rest, by enacting that the purchaser shall *not* be entitled to require that the conveyance to him be executed either in his or his solicitor's presence; but it enables him at his own cost to have the execution of the conveyance by the vendor witnessed and attested by some person appointed by him, and the act expressly says that he is quite at liberty to appoint his solicitor to be the attesting witness.

II. The Payment of the Purchase-Money.

Payment of purchase-money to vendor's solicitor:

Another point which will occur to you is: suppose the vendor does not attend in person to complete, is the purchaser justified in paying the purchase-money to his solicitor? Formerly, the purchaser would not have been justified in paying the purchase-money to the vendor's solicitor unless he produced a written authority from the vendor authorizing him to receive it, and the purchaser could insist on his producing such an authority before paying him the money (see *Viney* v. *Chaplin*); and unless such authority was very carefully worded, strictly it required stamping as a power of attorney. Now, however, in ordinary cases, matters are simplified by the Conveyancing Act, 1881, s. 56, which provides that when a solicitor produces a deed which has a receipt either in the body of the deed or indorsed thereon, the

(a) in ordinary cases;

deed being executed, or the indorsed receipt signed by the person entitled to give a receipt for the consideration, the deed shall operate as a sufficient authority for the person who has to pay the purchase-money to pay it to such solicitor without having any separate authority. Formerly, it was held that if the vendors were trustees they had no right to authorize their solicitor or any one else to receive the purchase-money (see *Waugh* v. *Wyche* and *Robertson* v. *Armstrong*); and that the Conveyancing Act did not authorize trustees to require the purchaser to pay the money to their solicitor on the production of a deed duly executed. (*Bellamy* v. *Metropolitan Board of Works.*) But by the Trustee Act, 1893, s. 17, re-enacting a similar provision (now repealed) contained in sect. 2 of the Trustee Act, 1888, a trustee can appoint his solicitor to be his agent to receive and give a discharge for the purchase-money, by allowing the solicitor to have the custody of and produce a deed with such a receipt as is referred to in sect. 56 of the Conveyancing Act, 1881, and no trustee will be chargeable with a breach of trust only because he makes such an appointment; and the producing of any such deed by the solicitor will have the same validity and effect under sect. 56 as the same would have had had the person appointing such solicitor not been a trustee. But this section does not apply so as to enable an attorney of a trustee to delegate to a solicitor the duty of receiving the purchase-money. (*Re Hetting and Merton's Contracts.*) In *Flower* v. *Metropolitan Board of Works*, it was held that where there were several trustee-vendors, the purchaser could insist on all the trustees attending personally, or else on their giving a written and signed direction that the money should be paid to their joint account in some bank, and that he was justified in refusing to pay the money to one trustee authorized by the others to receive. The principle of this case is not affected by the above provision of the Trustee Act, *because the act does not authorize trustees to delegate one of themselves* to receive the money. If, however, the co-trustee were also a solicitor acting professionally in the matter, they probably might do so.

(b) when vendor is trustee.

Liability of purchaser as to application of purchase-money:

Under the old law the liability of the purchaser to see to the application of the purchase-money was a matter of great importance; when the vendors were trustees the purchaser had to

see that the money he paid to them was duly applied by them as directed by the instrument under which they derived their power to sell; from this liability, however, he was free, if the instrument under which they sold expressly declared that their receipts should be good discharges, or, in the absence of such a receipt-clause, if the nature of the trust was such that exemption from the liability could be implied. It would be so implied when the trust was for the payment of debts generally, or when the money was to be paid over to persons who were not ascertained or who were not *sui juris*, or if the money to be derived from the sale was to be applied upon trusts which required time or discretion for their application. So, too, when executors were selling chattels real, they could give a good discharge for the purchase-money, for the full power to sell their testator's personalty is inherent in the office of executor. (See generally, on this point, *Elliott* v. *Merriman*.) Questions of this sort were, however, rendered of much less importance by 22 & 23 Vict. c. 35, s. 23, which enacted that "the *bonâ fide* payment to, and the receipt of, any person to whom any purchase or mortgage-money shall be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application, or being answerable for the misapplication thereof, unless the contrary shall be declared by the instrument creating the trust or security." This enactment was not retrospective, and applied only to instruments executed since August 13th, 1859, and as it only applied to purchasers and mortgagees it was considered not to be sufficiently ample. Accordingly, Lord Cranworth's Act contained a section upon the subject (sect. 29), which ran as follows:—"The receipt *in writing* of any trustees or trustee for any *money* payable to them or him by reason or in exercise of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the person paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof." This enactment only applied to instruments executed after the 28th August, 1860, and could be excluded by the expression of contrary intention. Now, however, by the Trustee Act, 1893, s. 20, re-enacting a similar provision (now repealed)

express exemption;

implied exception;

on sale of chattels real.

Statutory provisions as to—

(a) Lord St. Leonards' Act, 1859;

(b) Lord Cranworth's Act, 1860;

(c) The Conveyancing Act, 1881;

contained in sect. 36 of the Conveyancing Act, 1881, it is enacted, "That the receipt *in writing* of any trustee for any *money, securities, or other personal property or effects*, payable, transferable, or deliverable to him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof," and this provision is entirely retrospective and applies to trusts created either *before or after* the commencement of the act. And finally, by the Settled Land Act, 1882, it is provided (sect. 40) that the receipt in writing of the trustees of a settlement, or of one of them, where one is empowered to act, or of the personal representatives of the last surviving or continuing trustee, for money or securities, shall be a sufficient discharge to the purchaser. The result of these several enactments is, that it will not in future be necessary for you to trouble yourself about seeing to the application of the purchase-money; for if the trustees are selling under powers given them by the settlement, or under the Settled Land Act, their receipts will, whatever the date of the instrument, be a sufficient discharge.

(d) The Settled Land Act, 1882.

Duties of solicitor on completion.

Acting for the vendor, when you hand over the deeds to the purchaser or his solicitor, you should take care to obtain his signature to a schedule containing a list of the deeds handed over; and acting for a purchaser, you should take care to see that all the abstracted documents (and the earlier title deeds also) are handed over on completion. (See *Parr* v. *Lovegrove*.) The completion being thus effected, if the conveyance is not already stamped your duty will be to see that the proper stamp duty is impressed, the time allowed for this being thirty days from the time of completion. The stamp duty when the consideration exceeds 300*l.* is at the rate of 5*s.* for every 50*l.* and every fractional part of 50*l.* thereof (54 & 55 Vict. c. 39, s. 53), but the subject of stamp duties we consider more at length on a subsequent page. (See *post*, pp. 224—226.)

III. Some Special Formalities in connection with the Parties Conveying.

When the Vendor is a Married Woman.

Acknowledged deed: when necessary.

If the vendor is a married woman, and the property is not hers for her separate use, either by the doctrines of equity or by statute, the deed will need acknowledgment. This will now apparently only occur in the case of interests in land and reversionary interests in personalty (which she can dispose of under Malins' Act by deed acknowledged) which are not hers for her separate use: nor will acknowledgment be necessary even in these cases where the means by which she can dispose of the property is a deed of appointment under a power, or when the property is vested in her as a bare trustee. (Trustee Act, 1893, s. 16; and see *Dockra* v. *Faith*, and *ante*, p. 20.)

Manner of taking acknowledgment.

In cases where acknowledgment is necessary, it was formerly regulated by the Fines and Recoveries Act (3 & 4 Will. 4, c. 74), the provisions of which were, by the 8 & 9 Vict. c. 106, extended to contingent interests and executory and future interests in hereditaments and to disclaimers, and by 20 & 21 Vict. c. 57, to reversionary interests in personal estate coming to her under any instrument dated after 1857, and not being a settlement made upon her marriage. But by the Conveyancing Act, 1882, and the rules made thereunder, an acknowledgment, which by 3 & 4 Will. 4, c. 74, was required to be made, *inter alia*, before two special commissioners appointed as by the act provided, may now be made before one perpetual or one special commissioner; and though the memorandum of acknowledgment which is required by sect. 84 of the Fines and Recoveries Act to be indorsed on the deed after its acknowledgment is retained, yet, by the repeal of the latter part of that section and sects. 85 to 88, the certificate of acknowledgment which those sections required the person taking the acknowledgment to sign, and which had to be filed in the Common Pleas, is now unnecessary, as far as relates to deeds executed after 31st December, 1882. But in cases where a married woman has executed a deed before that date, the certificate is still necessary; and if it has not been filed before then, it is still to be filed in the way directed by the

repealed sections. And further, the repeal of sect. 87 is not to affect the keeping, as by that section directed, of an index to such certificates as are filed before or after the commencement of the act we are now discussing; and the repealed sect. 88, which provides for the delivery of an office copy certificate to a person applying for it, and enacts that such copy shall be received as evidence of the acknowledgment, is in effect re-enacted. And, lastly, for the repealed section 86, which provided that on the filing of the certificate the deed should take effect from the time of its being acknowledged, and that the subsequent filing of the certificate as aforesaid should have relation to such acknowledgment (the effect of which was that until the certificate was filed the deed was of no validity: *Jolly* v. *Handcock*), is substituted the provision that where the memorandum of acknowledgment purports to be signed by a commissioner, &c., the deed shall, as regards the execution by the married woman, take effect at the time of acknowledgment; and further, that the deed shall in that case be conclusively taken to have been duly acknowledged.

Time of operation of acknowledged deed.

Sect. 7 is also directed to another point connected with the acknowledgment of deeds of married women. It was apprehended that a deed executed and acknowledged by a married woman under the Fines and Recoveries Act, might be liable to be invalidated by the circumstance that the judge or one or both of the commissioners taking the acknowledgment might be or might have been interested or concerned, either as a party or otherwise, in the transaction giving occasion for such an acknowledgment; and accordingly the statute 17 & 18 Vict. c. 75, was passed, which provided that no deed thereafter duly acknowledged should be impeached or impeachable, after the certificate had been filed, by reason only that the person or persons, or either of the persons, taking the acknowledgment was or were interested or concerned, either as party or parties, or as attorney or solicitor, or clerk to the attorney or solicitor, of one of the parties or otherwise. Now sect. 7 repeals this statute, and re-enacts it in form more applicable to acknowledgment as it will take place under the present act, providing that a deed duly acknowledged shall not be impeached or impeachable by reason of the judge, commissioner, &c., being interested either as a

Commissioner taking acknowledgment must not be interested.

party, solicitor, or clerk to a solicitor, for one of the parties interested. And it further authorizes the making of general rules for preventing any person interested from taking an acknowledgment; but these rules, the section stipulates, shall not make invalid any acknowledgment.

Rules on the subject.

The Rules of 1883, published under this section, provide that no person shall take an acknowledgment if he is interested in the matter, either as a party or solicitor, or clerk to a solicitor, of one of the parties; that before taking the acknowledgment he must separately examine the woman as to whether she intends to give up the property without having any provision made for her; and if it appears to him that it is intended that provision shall be made for her, he is not to take the acknowledgment until satisfied that some provision has been actually made by some deed or writing produced to him, or where such provision has not been actually made beforehand, then he must require the terms of the intended provision to be reduced to writing and to verify the same by his signature. These rules also give a form of acknowledgment to be indorsed on the deed, and also a form of declaration to be made by the commissioner that he is not interested.

When the Vendor is an Executor or Administrator.

One executor can assign, and before probate.

You should bear in mind that one of several executors can assign any personalty forming part of the estate, including leaseholds, and that the assignment can validly be made even before probate is taken out, and even though the property is specifically bequeathed; but in such a case probate should be asked for as soon as possible afterwards, for this constitutes the only evidence of the executor's title and right to make the assignment.

One administrator can also assign, but not before grant.

This power does not extend to administrators, who must obtain letters of administration before they can make a valid assignment. (See *Morgan* v. *Thomas*.) It would seem that if there are several administrators, all need not join in the assignment, but an assignment by one will be good; but as this is not clear and certain, in practice you should see that all administrators join. (See *Jacomb* v. *Harwood*.)

When the Vendor is under some Disability.

Conveyance by means of a vesting order.

Sometimes it will be necessary to have recourse to the Trustee Act, 1893, ss. 25 to 42, which, in effect, re-enact the provisions of the Trustee Acts, 1850 and 1852 (now repealed): this will occur when the legal estate is vested in some person as trustee, and he is unable or refuses to convey, or is not ascertained, or cannot be found, &c. Thus, under this act, the High Court, and in proper cases the County Courts and the Chancery Palatine Courts of Lancaster and Durham, may make orders vesting the lands in such persons as the court may direct, in the case of

Cases in which necessary.

(1) a lunatic or infant trustee or mortgagee; (2) a trustee who is out of the jurisdiction, or who cannot be found; (3) in the case of its being uncertain which of several trustees was the survivor, or of its being uncertain whether the trustee last known to have been seised is alive or dead; (4) or of a trustee who refuses to convey for twenty-eight days after being called upon to do so. Instead of making a vesting order the court may appoint some person to make the conveyance, and this, when made, will have the same effect as a vesting order. And when specific performance or the conveyance or assignment of land is ordered in any action, the court may declare any party to the action a trustee within the meaning of the act, and it may also declare, concerning the interests of unborn persons, who might claim under any party to the action, or the will or voluntary settlement of a deceased person, who during his life was party to the contract or transaction, concerning which the decree in the action is made, that such interests of unborn persons are the interests of persons who would on coming into existence be trustees within the meaning of the act, and thereupon the court can deal with their estates and interests, whether such persons are born or unborn, by vesting orders under the act.

Clearing off incumbrances.

Another case in which you may have to apply to the court is, where the land is subject to some incumbrance which you wish to have cleared off before completion, and there are difficulties in the way of obtaining the concurrence of the incumbrancer. On this point, sect. 5 of the Conveyancing Act, 1881, provides that (whether the land is sold by order of or out of court) you may apply to the court to allow payment into court—

in the case of an annual sum charged on the land, or a capital sum charged on the determinable interest in the land—of an amount sufficient, when invested, by its dividends to keep down the charge, and, in any other case of capital money charged on the land, of an amount sufficient to meet the incumbrance and interest, with a further sum in both cases not exceeding one-tenth of the main amount to meet the contingencies of further costs, interest and expenses, &c. On such payment being made the court may, either after or without notice to the incumbrancer, declare the land free from the incumbrance, and make any vesting order or order for conveyance necessary to give effect to the sale.

IV. Steps to be taken subsequently to the execution of the Conveyance.

Steps subsequent to conveyance:

We will now presume that you have seen that the conveyance has been duly executed, and that the purchase-money has been paid to the persons entitled to receive it. The next point which you must attend to is to consider what, if anything, must be done by you to perfect the conveyance.

When the Lands sold are in Middlesex, Yorkshire, and Kingston-on-Hull.

(a) When lands in register county.

If the land is situated within the district included by any of the Local Registry Acts, the conveyance will not be complete until it is registered; since, if not registered, the title of the purchaser is liable to be displaced by the prior registration of some subsequent conveyance or mortgage. But as to land situate in Middlesex, the assurance need not be registered if it is copyhold; nor need leases at a rack-rent, nor other leases not exceeding twenty-one years in length where the possession and occupation go along with the lease. In Yorkshire similar exceptions prevail, save that the exceptions with regard to leases only extend to leases not exceeding twenty-one years, and other leases must be registered, even though the rent is a rack-rent. Again, the Middlesex Act has no operation within the City of London. Where a lease in either county requires registration, all assignments thereof must be registered.

Registration of deeds.

When a document requires registration a memorial for registration must be prepared. Whether the land is in Middlesex or Yorkshire this memorial is regulated by nearly the same rules. In the case of a deed it must be under the hand of one of the parties thereto, or in the case of a will under the hand of some or one of the devisees, or of one of his heirs, executors, administrators, guardians, or trustees, and must be attested by one witness, such witness to be a witness or one of the witnesses to the execution of the conveyance. If every witness is dead, or abroad, or cannot be found, or for some other cause he cannot attest the memorial, a statutory declaration must be left with the memorial stating the reason why the memorial is not witnessed as required by the act. (See the 1st Schedule to the Middlesex Registry Act, 1891, and Rules thereunder.) It must contain the date of the instrument being registered, the name and additions, &c. of the parties, and, in the case of a will, of the testator, and of all the witnesses to the document required to be registered, and, where possible, with the places of their abode, a description of the lands conveyed, and the name, description, &c. of the person on whose behalf the memorial is registered.

Some special provisions as to Yorkshire.

Under the Yorkshire Registry Act, 1884, no instrument will be registered unless, if a deed, the original is produced to the registrar; in the case of a will, the probate or an office copy; if an order of court, an office copy thereof; if a private act, a Queen's printers' copy; if an award, a copy thereof under the seal of the commissioners, or a copy thereof signed by the clerk of the peace or his deputy, purporting the same to be a true copy, or the absolute order of the commissioners duly sealed. Immediately on the registration a certificate will be endorsed on the instrument stating the date of the registration, and referring to the page of the register where the same is to be found registered. The effect of registration will be that all assurances registered will have priority according to the date of registration. Registered wills will have priority according to the date of the testator's death, if registered within six months of the testator's decease; but according to the date of registration, if that takes place after such period of six months. No person is to lose the priority given by registration merely in consequence

of his having been affected with actual or constructive notice, except in cases of fraud; but this is not to confer on any person claiming without valuable consideration under any person any further priority or protection than would belong to the person under whom he claims, and any disposition which, if unregistered, would be fraudulent and void will remain so in spite of registration. But registration does not amount to actual notice, the provision of the Act of 1884, that registration should be notice, having been repealed by the amending act of 1885.

Searches in register counties.

Provisions are made giving all applicants a free right of search of the registers, and official searches may, under the Yorkshire Registry Act, 1884, be obtained on sending in a requisition in writing requiring such search to be made. The result of an official search will be embodied in a certificate, and such certificate will be received in evidence. And certified copies of or extracts from any document registered may be obtained, and will be receivable in evidence except where the laws of evidence require the production of the original document.

The stamp duty on a memorial is 2*s.* 6*d.*, unless the instrument to be registered is chargeable with a less duty, in which case the memorial is chargeable with the same duty as that on the instrument. (See Stamp Act, 1891, Schedule.)

Where the Lands are conveyed for some Charitable Purpose.

(b) When lands conveyed for charitable purposes, deed must be enrolled.

If you are acting for a charity, and the conveyance comes within the Mortmain Act, 1888, as amended by later statutes (see *ante*, pp. 11—16), and so requires enrolment, you must take care to have the assurance enrolled under that act; this enrolment must be effected within six months after execution. You must bear in mind that the enrolment must be made whether or not valuable consideration has been given for the land. But a conveyance of two acres or less of land to a society for the promotion of religious, educationary, artistic, or literary objects or the like, does not require to be enrolled. As to conveyances of land for the purposes of a public park, school-house, elementary school, or public museum, or to a local authority under the amending act of 1892, or for the purpose of erecting dwellings for the poor of populous places under the Dwellings for the Working Classes

Exceptions.

Act, 1890 (see *ante*, pp. 13, 14), they must be enrolled with the Charity Commissioners, not in the Central Office; the time for enrolment being, in the case of a deed, within six months of its execution. Where enrolment is required, the original deed must be enrolled; but when the original deed is lost, an order may be obtained on summons from the Chancery Division authorizing any subsequent deed which discloses the charitable trusts to be enrolled instead. And the court may authorize the enrolment of a deed after the time limited for so doing, if satisfied that the conveyance was of a nature to be validated by enrolment under the act, and that the omission arose from inadvertence, ignorance, or the destruction or loss of the instrument by time or accident; and also that the assurance was made in good faith, *and for valuable consideration*, and to take effect in possession immediately from the making thereof without any power of revocation, reservation, condition or provision except so far as authorized by the act, and also that at the time of the application, possession or enjoyment is being held under the assurance. But if at the time of the application any proceeding is pending for setting aside the assurance, or for asserting any right founded on its invalidity, or if any decree or judgment founded on such invalidity has been obtained, then enrolment will not give any validity to the assurance. The enrolment, when authorized, must be made within six months after the making of the order. (See *ante*, pp. 14 *et seq.*)

Enrolment of lost deed.

Some other Special Cases.

(c) Some special cases:

Registration will also be necessary when the deed grants an annuity (vide *ante*, p. 125, and *post*, p. 218), and enrolment is required when a statutory bargain and sale is the form of assurance made use of (vide *ante*, p. 90): and when the vendor is a tenant in tail, and the design of the conveyance is to bar the entail, enrolment will also be necessary in this case. And, again, a deed may be enrolled for safe custody, *i.e.*, it may be transcribed on the records of one of the higher courts or of a court of quarter sessions, the effect of which will be that it becomes not a record, but a deed recorded. Again, a transfer of personalty by bill of sale must be registered in all cases falling within the Bills of

(1) grants of annuities must be registered;

(2) disentailing deeds must be enrolled;

(3) bills of sale must be registered.

Sale Acts, 1878 and 1882, or either of them. This subject is fully treated of in the chapter on Bills of Sale, *post*, Part III.

V. Some Special Conveyances.

In the above remarks we have chiefly contemplated the case of the conveyance of freehold interests in real property. There remain to be treated of interests in property, real and personal, other than this peculiar kind, and upon the conveyance of which various points of law must be borne in mind. We then propose to offer a few remarks on the modes of conveyance, and the law affecting the following kinds of property:—

1. Copyholds.
2. Leaseholds.
3. Assignments of Choses in Action.
4. Assignments of Policies of Assurance.
5. Assignments of Goodwill.
6. Grants of Annuities.
7. The Assignment of Letters Patent.
8. Assignments of Copyright.
9. Grants of Advowsons.
10. The Creation of Easements.
11. The Conversion of Long Terms of Years into Freeholds.

And then to conclude the law relating to vendor and purchaser by a few observations bearing upon the law of stamps on conveyances and on the subject of the legal charges to which a solicitor acting for a vendor or purchaser is entitled.

(1) *Copyholds.*

Conveyance of estates in fee in copyholds.

By surrender,

Copyholds are assured by surrender and admittance. The surrender and admittance are usually conducted by the steward of the manor. The surrender may be made either in or out of court. If made in court, it is entered on the rolls, and a copy of so much of the rolls as relates to the surrender is given to you as purchaser's solicitor, and will form the muniments of your client's title. If the surrender is made out of court, a memorandum in writing is made of it, and signed by the

parties and the steward, and it is then entered on the rolls, and no presentment of the surrender to the court prior to enrolment is now necessary. (4 & 5 Vict. c. 35, ss. 89, 91.) The effect of the surrender on the vendor is, that though he remains a tenant of the lord until the surrenderee is admitted, he loses all control over the land, and is unable to surrender to anyone else.

and admittance,

But it confers merely an inchoate right on the purchaser, which must be completed by admittance, so that the purchaser cannot surrender till he has been admitted, nor strictly can he enter upon the land without, at least technically, committing a trespass. He can, however, assign this right to be admitted by act *inter vivos*, or by will (see *Wainwright* v. *Elwell*), and if he dies before admittance, his widow will be entitled to dower. The admittance must follow the terms of the surrender, so that the admittance of any other person than the surrenderee will be void; but any person may now be admitted by attorney (Copyhold Act, 1887, s. 2), and the purchaser's title upon admittance relates back to the surrender.

and the payment of fines.

Fines are arbitrary or fixed.

Fines are usually payable on admittance; these may be either fixed or arbitrary; but even in the latter case they are limited to two years' improved value of the land. But it seems that this limitation does not apply to the case of a voluntary grant.

Joint tenants.

The admission of one of several joint tenants or coparceners is the admission of all; but the fine payable in the case of joint tenants, though a single one in a sense, is increased by the number of the tenants. (See *Bence* v. *Gilpin*.)

Tenants in common.

But tenants in common must be admitted severally, and a fine will be payable in respect of the share of each.

Tenant for life.

Again, the admission of a tenant for life generally amounts to the admission of all persons entitled in remainder, and one fine only is payable; this the tenant for life usually pays, and he must look to the remaindermen for the repayment of an amount proportionate to their interests. But, in some manors, the remaindermen must be admitted, and pay fines upon admittance.

Devisees in trust for sale.

Devisees with a trust for sale will have to be admitted, and pay a fine before they can convey to a purchaser, unless there is a tenant for life who can sell and convey under the Settled Land Acts, for in that case the purchaser will be admitted on payment of a single fine (45 & 46 Vict. c. 38, s. 20, sub-s. 31); so it is usual, when it is intended that the lands shall be sold after the testator's death, not to

devise the lands to the trustees, but merely to *direct* them to sell; for if the property is sold under such a direction, the trustees need not be admitted, but a purchaser from them can claim admittance on the payment of a single fine. (See *Garland* v. *Mead*.) Copyholds are now devisable by will without any previous surrender to the use of the will. (See 55 Geo. 3, c. 192, and sect. 3 of 1 Vict. c. 26.)

Conveyance of estates tail in copyholds.

If there is a custom to that effect in the manor, there may be estates in tail in copyholds, and to such estates the Fines and Recoveries Act applies. These estates tail must, if legal, be barred by surrender; if equitable, they may be barred either by surrender or by deed (sect. 50). If made by deed, the deed must be entered on the court rolls within six months of execution. This subject is regulated by 3 & 4 Will. 4, c. 74, and will be more fully treated of in a subsequent chapter. See *post*, Part VI.

Covenants for title.

A deed of covenant to surrender usually precedes or accompanies the surrender. This deed merely contains a covenant by the vendor to surrender, or cause to be surrendered, the copyhold lands to the purchaser at his cost. In this deed the usual covenants for title are incorporated, and by the use of the prescribed words, "beneficial owner, &c.," they may apparently be so incorporated without the necessity of express mention, under the Conveyancing Act, 1881; for a "conveyance" within that act, into which the covenants for title there set out may be implied, includes a covenant to surrender.

Enfranchisement of copyholds:

A few words on the modes in which copyholds may be enfranchised will, perhaps, not be out of place here. Enfranchisement may be effected independently of any statutory powers, if the lord of the manor and the copyholder mutually agree to make it. But in the case of a voluntary enfranchisement, the lord can only (except as allowed by the Settled Land Acts, 1882 to 1890, *vide infra*) accomplish it when he has the whole freehold of the land in himself, and if he is under any disability he cannot do so; and, again, the enfranchisement must be made to the tenant, though it is not necessary in his case that he should have the whole fee; for if he has only a limited interest, and the lord conveys to him the whole fee in the land, the land will become enfranchised, but the tenant will hold the estate for the benefit of persons interested after him. A voluntary enfran-

(a) voluntary.

How effected:

chisement is carried out by deed, whereby the lord conveys the land to the copyholder in fee freed from all the incidents of copyhold tenure, and also grants to the tenant the commonable rights appurtenant to the land. This latter grant is unnecessary, as the enfranchisement in itself extinguishes all the rights of the tenant of this nature. The Copyhold Act, 1841, applies to voluntary enfranchisements, and enables the lord, whether he has the whole freehold interest or not, with the consent of the Board of Agriculture (Land Commissioners Department), to enfranchise the lands, and enables any tenant to accept the enfranchisement, both giving certain notices to persons interested when they have not the absolute interest in the lands. The enfranchisement is carried out by deed, which does not seem to need entry on the court rolls. The consideration for the enfranchisement may be charged on the land as a rent-charge, or it may consist of the conveyance of lands to be held subject to the same uses as the lands enfranchised. As to the expenses of the enfranchisement, these lie with the commissioners, who may direct how they are to be borne. If either party is under disability, his guardians, trustees, committee, or some person named by the commissioners, as the case may be, may be substituted for him, and if the lord is under disability the consideration money will be paid into court or to the trustees.

(1) where no disability;

(2) where one party is under disability;

(3) under the Settled Land Act.

Provisions are made for voluntary enfranchisement by the Settled Land Act, 1882, which enables a person who is a tenant for life under the act to sell the seigniory of any manor, or the freehold of any copyhold land, reserving or not reserving mines, &c., so as to effect enfranchisement, and to convey the interest so sold to a purchaser. No re-grant of any right of common, or other right appurtenant or appendant to the land, is necessary in this case. The regulations which the tenant for life must observe on selling ordinary land under the powers given by the act must also be observed on enfranchising copyholds, so that, *inter alia*, he must give the trustees of the settlement the requisite month's notice of his intention to enfranchise. (As to which see *post*, Part V.)

Compulsory enfranchisement.

Compulsory enfranchisement is provided for by the Copyhold Acts, 1852, 1858, and 1887, under which either the tenant or the lord may insist on enfranchisement by giving the notice

thereby prescribed. The tenant cannot require enfranchisement unless he has paid all fines, &c., payable. The consideration is to be fixed by valuers appointed under the acts, or the question may be referred to the Board of Agriculture (Land Commissioners), or the parties may agree in writing as to the amount, or may appoint a valuer or valuers to determine it. If the lord compels enfranchisement it is, unless the parties otherwise agree, to be an annual rent-charge, redeemable, however, by the tenant at twenty-five years' purchase. If the tenant enforces the enfranchisement, the compensation is to be a gross sum, except when the contrary is agreed, or the land is capable of sufficient identification, and the compensation amounts to more than one year's improved annual value of the land. The act of 1887 facilitates enfranchisements, by providing that, on the admittance of any copyhold tenant after 31st December, 1887, the steward must give him notice informing him of his right to have enfranchisement compulsorily effected by him. The commissioners are to frame a scale of compensation moneys applicable to various cases, but this is only for guidance to the parties, and neither is bound to accept it. Special provisions are made for turning the whole of the copyholds in a manor into freeholds, where the fines of the manor are certain, and there is a practice for copyholders in fee to grant derivative interest to persons who are admitted tenants of the manor. Such wholesale enfranchisements are only to be effected where the lord of the manor or one-fourth of the copyholders request it, and not less than two-thirds of the tenants are in favour of it. Where the compensation in ordinary compulsory enfranchisements does not exceed 500*l.*, the enfranchisement can be effected without resort to the Board by a simple declaration in writing by the lord. But in other cases the enfranchisement is not carried out by a deed, but by an award of the commissioners duly confirmed. The effect of the award is to make the land freehold, but to leave it subject to existing leases, commonable rights, settlements and incumbrances on the land, and to the lord's rights to mines, and his reversion by way of escheat. The expenses will have to be borne by the party requiring enfranchisement, but they may be charged on the lands by way of mortgage. Death of either of the parties will not cause the proceedings to abate.

A deed of enfranchisement of lands in Middlesex or Yorkshire requires registration. (*Reg.* v. *Lord Truro.*)

(2) *Assignment of Leaseholds.*

Position of purchaser of lease.

Should your client inform you that he has purchased a term of years, you should ascertain whether or not he has entered into a written contract for the same; for sect. 4 of the Statute of Frauds requires contracts for sale of a term to be in writing. You should take care to impress upon him, too, that on an agreement to purchase a lease, the purchaser is deemed to have notice of all the covenants in the lease, provided he has a fair opportunity of ascertaining what those covenants are. (See *Hyde* v. *Warden.*)

A deed required.

We have already pointed out what title the purchaser can call upon the vendor to show, and the effect of the production of the receipt for the last payment of rent under the provisions of sect. 3 of the Conveyancing Act, 1881. The assignment must, by the joint effect of the Statute of Frauds and 8 & 9 Vict. c. 106, s. 3, be by deed, and this even though the term does not exceed three years.

What it should contain.

The assignment should contain the usual covenants that the lease is in full force, that the rent has been paid, and the conditions and covenants observed and performed, that the lessor has power to assign, for quiet enjoyment free from incumbrance, and for further assurance. These covenants can now be omitted if reliance is placed upon sect. 7 of the Conveyancing Act, 1881, and the lessor is made to assign as beneficial owner.

Position of lessee after assignment.

In spite of the assignment, the lessee remains liable upon the express covenants which he has entered into in the lease, and this even though the lessor accept rent from the assignee. (*Thursby* v. *Plant.*) On the other hand, the assignee, though not bound by the personal covenants of the lessee, is bound to perform all those covenants which run with the land (*Spencer's Case*), and all restrictive covenants of which he has notice, express or constructive (*Tulk* v. *Moxhay*); and this liability commences even before he takes actual possession. (*Walker* v. *Reeves.*)

Position of assignee after assignment.

The assignee stands in a better position than the original lessee in regard to the liability on the covenants of the

lease; for should he, the assignee, in his turn, assign the lease, he gets rid of all liability to the original lessor, except as to breaches prior to the assignment by him, though under his express covenant of indemnity given to his assignor he will be liable for breaches of covenant committed after assignment by him. (*Harvey* v. *King; Philpot* v. *Hoare.*) This difference in the liability of the lessee and of the assignee arises from the fact that, while *privity of contract* exists between the lessor and lessee, and lasts during the whole of the term, there is only privity of estate between the lessor and assignee, which ceases directly the assignee assigns to someone else. The recent case of *Smith* v. *Gronow* is well worth notice. There there was a clause in the lease for forfeiture upon the bankruptcy of the lessee, his executors, administrators or assigns. The lessee assigned the lease and became bankrupt. It was held that the proviso for re-entry referred only to the bankruptcy of the person holding the estate, and that the lessor could not therefore re-enter on the bankruptcy of the lessee after he had assigned the lease.

Covenants by assignee.

The assignee must covenant to pay the rent and perform the covenants in the lease, and to indemnify the assignor against the same. (*Pember* v. *Mathers.*) Even in the absence of an express covenant, there is an implied promise by the assignee to indemnify the assignor, but this would not bind the assignee after he had assigned, as would the express covenant for indemnification, and therefore in practice the express covenant is always inserted. (*Moule* v. *Garrett.*)

Position of executor of lessee.

When leaseholds devolve on the lessee's executor or administrator, the executor or administrator becomes liable upon the covenants in and for the rent reserved by the lease to the extent of the assets which come to his hands, but he is not liable as an assignee personally to the original lessor. With regard, however, to the covenant to repair, it has been held that he is personally liable in respect thereof to the original lessor (with, of course, a right of recoupment out of the assets, if there are any), and if he actually takes possession he is liable personally to pay an occupation rent (not necessarily the rent reserved by the lease) for such part of the premises as he personally occupies. (See *Rendall* v. *Andrae* and *Tremeere* v. *Morrison.*) In order to relieve executors and administrators from liability

in respect of leases held by their testators and intestates it has been provided that, by satisfying all liabilities accrued due and claimed under the lease to his testator or intestate, and by setting apart a sufficient sum to answer any future claim in respect of any *fixed and ascertained* sum under the lease, and then assigning the lease to a purchaser, and distributing the residuary estate, he will no longer be liable in respect of any claim under the lease, and the lessor can only follow the assets distributed. (22 & 23 Vict. c. 35, s. 27.)

When a lease is specifically bequeathed by will, directly the executor assents to the bequest the legatee of the lease is regarded as an assignee thereof with all his liabilities. (*Austin* v. *Beddoe;* and see *Thorne* v. *Thorne*.)

(3.) *Assignments of Choses in Action.*

Choses in action not assignable at law.

A chose in action was always assignable in equity; but with some few exceptions it was not assignable at law. (See *Ryall* v. *Bowles*, and *Row* v. *Dawson*.)

Assignable—(1) in equity;

The effect of this rule was, that when a chose in action was assigned by deed, in order to enable the assignee to sue in courts of law, it was essential to insert therein a power of attorney from the assignor, enabling the assignee to sue on the chose in his (the assignor's) name.

(2) by the Judicature Act.

But by the Judicature Act, 1873, s. 25, it is provided that any absolute assignment in writing under the hand of the assignor (not purporting to be by way of charge only), of an interest of any debt or other legal chose in action of which notice in writing shall have been given to the debtor or other person liable thereon, shall be effectual in law to pass the legal right to such debt or chose in action from the date of such notice, and all legal or other remedies for the same, and power to give a good discharge for the same without the concurrence of the assignor. Provided, that if the debtor has had notice that such assignment is disputed by the assignor, he shall have the right to pay the money into court, or to call upon the parties to interplead.

Formalities of assignment.

With reference to this section, which is retrospective so as to apply to assignments made prior to the act (*Dibb* v. *Walker*), it has been decided that it applies not only to absolute assignments strictly so called, but to assignments by way of mortgage made

in the usual form of an absolute conveyance with a proviso for redemption (*Tancred* v. *Delagoa Bay Railway Co.*), as well as to absolute assignments with trusts engrafted. (See *Burlinson* v. *Hall.*) It has also been held that, despite the section, an assignee of a legal chose can still sue in the name of the assignor if he has a power of attorney for the purpose. (See *Doulton & Co.* v. *Beguinot;* see also *Bills* v. *Tatham.*)

Assignee takes subject to all equities.

As the assignee of a chose in action takes subject to all the equities affecting it, before you allow your client to complete his purchase, you will take care to see that the debt is owing and is in no way charged, and with this object you will make due inquiries from the debtor or holder of the fund, and though you cannot force him to answer your inquiries, yet, if he does not do so, you will draw your own conclusions, and warn your client against completing. If the fund assigned is in the hands of several trustees, you will take care to make inquiry of each trustee, since one may have received notice of a charge of which the others may have no knowledge.

Notice of assignment,

After completion, notice should be given in every case to the debtor whether the chose is legal or equitable, so as to prevent the debtor paying the money to the assignor (*Brice* v. *Bannister*), and also to obtain priority; for the rule is that, as between two assignees of a chose in action, he will have priority who has first given such notice. (See *Dearle* v. *Hall; Lee* v. *Howlett*, and *English and Scottish Investment Society* v. *Brunton.*) And this rule in requiring notice is reasonable enough; for as Plumer, M.R., said in *Dearle* v. *Hall*, "though the original *cestui que trust* has in fact parted with his interest, he appears to the world to be the complete equitable owner, and remains in the order, management, and disposition of the property as absolutely as ever; so that he has it in his power to obtain, by means of it, a false and delusive credit." On the other hand, by the notice, "the legal holders are converted into trustees for the new purchaser, and are charged with responsibility towards him; and the *cestui que trust* is deprived of the power of carrying the same security repeatedly into the market, and of inducing third persons to advance money upon it, under the erroneous belief that it continues to belong to him absolutely, free from incumbrances,

and that the trustees are still trustees for him, and for no one else." The rule requiring notice applies even to the case of an assignment effected in favour of a trustee in bankruptcy by a receiving order being made against a person to whom a chose in action belongs—that is to say, the trustee in bankruptcy must give notice to the debtor in order that he may preserve his priority. (*Re Stone's Estate.*) But the rule does not apply to debts charged on land, as to which notice to the debtor with the view of preserving priority is not necessary. (*Richards* v. *Humber.*)

should be to all trustees.

Where the money is in the hands of trustees, notice should be given to all the existing trustees, for though notice to one would be sufficient, so long as the circumstances of the case remained unaltered by the death of that trustee, or his ceasing to continue as such trustee or otherwise (*Meux* v. *Bell;* and see the quite recent case of *Ward* v. *Duncombe*), yet it would not be so if the trustee to whom notice was given had an interest adverse to that of his co-trustees, *e.g.*, where he has a beneficial interest which he has secretly incumbered (*Brown* v. *Savage*); nor would it be if at the time of a later assignment the trustee to whom notice was given was dead, and the assignee under the later assignment gave notice to all the then existing trustees. (*Timson* v. *Ramsbotham.*)

Stop order.

If the chose in action is a fund in court, there will be no person to whom you can give notice (see *Pinnock* v. *Bailey*); and in this case you should obtain a stop order, restraining the payment of the funds out of court without notice to you. This may be obtained by taking out a summons.

Distringas.

If the chose is stock standing in the debtor's name in the books of any company, you should obtain a distringas. This may be applied to the funds by making an affidavit in the form prescribed by the Rules of the Supreme Court, 1883, and preparing a notice also in the prescribed form and filing it at the Central Office in London. A duplicate of each will be returned to you sealed with the seal of the court, and these you will then serve on the company, and thereupon the funds or stock will stand restricted from being transferred without notice to you or without an order of the court.

Stop order and distringas.

If some part of the chose assigned is in the hands of the trustees, and the rest in court, or invested in stocks or shares, notice must be given to the trustees, and a stop order obtained or a distringas notice

filed and served as well. (See *Mutual Life Assurance Co.* v. *Langley*.)

Written notice not always necessary.

The notice when given should be a formal one, though, except in cases falling within sect. 25 of the Judicature Act, 1873, it need not be a written one; it has been held that a notice given casually in the course of a conversation, though given by the assignee himself, did not amount to notice. (*N. British Co.* v. *Hallett*.)

The absence of notice does not prevent the assignment being perfect (see *Foster* v. *Cockerell*); but the assignee cannot, in cases falling within the Judicature Act, 1873 (that is as to legal choses), sue in his own name till the notice has been given, and with regard to all choses, by not giving notice, he runs the risk as above pointed out of being postponed.

Additional formalities to be observed.

Besides giving notice, it is proper, before taking the assignment, to inquire from the debtor, &c., if he has received notice of any prior assignment, for of course you will be postponed to any incumbrancer who has given notice before you take your assignment, and you will, in practice, generally obtain a reply to such a question, though a reply cannot be compelled. (See hereon *Lowe* v. *Bouverie*.)

Assignment of choses in action by a married woman.

If the assignor of the chose in action is a married woman and it does not belong to her for her separate use, either under the various Married Women's Property Acts or otherwise, you must bear in mind the law as to the rights which her husband has therein. The rule is, that such choses in action belong to him, so far as he reduces them into possession during the coverture. The result of this is, if the husband assigns his wife's choses in action and dies before the wife, and before he or the assignee has reduced them into possession, the assignment will be void as against the wife (see *Ellison* v. *Elwin*), and this is so even if the wife joins in the assignment. (*Proale* v. *Soady*.) As to what amounts to a reduction into possession, receipt of the money from the debtor by the husband will, of course, have this effect, or the transfer of a fund into his name or a payment to the wife herself. But where the money was paid to a third party to be appropriated to the use of the wife, and he informed her it was at her disposal, it was held that this was not a sufficient reduction into posses-

sion. (*Fleet* v. *Perrins.*) A mere judgment in an action at law was not sufficient, even if the husband died before execution (*Bond* v. *Simmons*); though an order for payment by a Court of Equity was held to amount to a reduction into possession by the husband. (*Forbes* v. *Phipps.*) And perhaps this equity rule would now prevail in all courts under sect. 25, sub-sect. 6 of the Judicature Act, 1873. If the chose in action of the married woman is reversionary, she may now assign it by virtue of Malins' Act, (20 & 21 Vict. c. 57); but the deed of assignment must be acknowledged in all cases where the title in reversion accrued before 1st January, 1883, to a woman married before that date. (*Reid* v. *Reid.*)

(4.) *Assignments of Policies of Assurance.*

Assignability of life policies.

A policy of life assurance was considered a chose in action, and so was not assignable at law; but it might be assigned in equity, so as to enable the assignee to sue on it in his own name. And now, by 30 & 31 Vict. c. 144, assignees of such policies can sue at law thereon in their own names; but no assignment will confer on the assignee the right to sue for the amount of the policy until a written notice of the date and purport of the assignment be given to the company liable under the policy at their principal place of business; and the date of the receipt of such notice will regulate the priority of claims under any assignment; and further, if the company *bonâ fide* pay the assurance money to some third person before receiving such notice they will not be liable to the assignee. For the purpose of facilitating the giving of this notice, companies are required to give an address for the service of it in every policy which they issue, and they may be required, on payment of a fee not exceeding 5*s.*, on a request by the person giving the notice, to deliver to him a written receipt of it, which will amount to conclusive evidence of the due receipt thereof.

Notice of assignment.

Agreement to assign.

Under this Act it has been held that a mere agreement to assign a policy is not an assignment of a policy within the act. (*Spencer* v. *Clarke.*)

Contents of assignment.

In the assignment the vendor generally covenants that the policy is subsisting and valid, that all premiums have been paid up to date, that he will do nothing

whereby it may be avoided or by which the premiums may be increased, and that if he does do so he will pay the advanced premium.

Precautions to be taken by purchaser.

Acting for a purchaser of a policy, you should require evidence that the statements upon which the policy was granted were true, and that the last payment of the premiums has been duly made, and if the policy is effected on the life of some person other than the assignor, you should require to be satisfied that the person effecting the insurance had an insurable interest in that person's life.

Assignee of chose entitled as against trustee.

Choses in action (other than debts due or growing due in the course of the bankrupt's trade or business) not being within the order and disposition clause of the Bankruptcy Act, 1883, should the assignor of a life policy become bankrupt, the assignee and not the trustee in bankruptcy would be entitled to the benefit of the policy. (See *Re Moore.*)

(5.) *Assignments of Goodwill.*

Sales of goodwill.

Position of vendor:

There are several points to be attended to on the assignment of the goodwill of a business. First, you must bear in mind that, in the absence of stipulation to the contrary, the vendor of the goodwill may set up a precisely similar business to that sold, and that next door to the premises where the original business was carried on. (*Churton* v. *Douglas.*)

(1) as to using old name;

But he cannot use the old name under which the business was carried on even, it would seem, if this name happens to be the same as his own. (See *Levy* v. *Walker.*)

(2) as to dealing with old customers;

(3) as to soliciting old customers.

And, secondly, he is quite at liberty to deal with the old customers of the business sold (*Leggott* v. *Barrett*); and, thirdly, he may even go so far as to solicit the favours of the old customers, by private as well as public solicitation. (*Pearson* v. *Pearson*, and *Vernon* v. *Hallam*, overruling *Labouchere* v. *Dawson;* and see also *Walker* v. *Mottram.*)

Precautions to be taken by purchaser.

In view of these decisions you should take care that some provision is made in the assignment to protect the rights of the purchaser. Thus it is proper to have a covenant by the vendor that he will not set up a similar business within such and such a distance of the premises where the business the goodwill of which is sold is carried on: and in framing such a covenant you must be careful

not to infringe the rule that covenants in total restraint of trade are void. (*Mitchell* v. *Reynolds*; *Vernon* v. *Hallam*; *Davies* v. *Davies*; *Pearls* v. *Saalfield*; *Mœnick* v. *Feneste*; *Rogers* v. *Maddock*; and particularly *The Maxim Nordenfeldt Gun and Ammunition Co.* v. *Nordenfeldt*, and *Roussillon* v. *Roussillon*.) And it would be desirable also to have a covenant by him that in the event of his setting up business outside the stated radius he will not solicit by private solicitation the custom of the old customers. Any more extensive covenant than this would probably be void as being in restraint of trade. (*Rogers* v. *Drury*.) On the sale of a business which had been carried on under order of the court for a long time by a receiver and manager, the court refused to restrain the receiver from soliciting orders from or doing business with the old customers. (*Irish* v. *Irish*.) The purchaser of a business and goodwill can use the vendor's name so long as he does not expose the vendor to any liability by holding him out as the real owner of the business. As this is somewhat indefinite, a covenant defining his rights in the matter might be useful. (*Thynne* v. *Shove*.) But when a company sells a business, the purchaser cannot use the name of the company in connexion with the business. (*Bolanchi's Chocolate Co., Re.*)

(6.) *Grants of Annuities.*

Personal annuities, how secured.

The payment of a mere personal annuity (*i. e.*, an annuity which is not charged on the land of the grantor) is usually secured by a bond; or it may be created by a deed of grant, in which it is generally the practice to join some third person as a surety. The deed of grant should contain a covenant by the grantor to pay the annuity, and upon this covenant he can be sued if any instalment of the annuity is in arrear. But annuities are more usually charged on land, in which case they are, strictly speaking, rent-charges. In such cases it was formerly necessary to insert in the instrument by which the annuity was granted clauses giving the grantee power to distrain for arrears on the land out of which the rent-charge or annuity issued; for a rent-charge is unconnected with tenure, and it was only in cases of a person being entitled to a rent by virtue of a tenancy that he was able at common law to distrain. By 4 Geo. 2, c. 28, s. 5, a

Rent-charges, how granted;

statutory remedies for;

power of distress was given to recover a legal rent-charge; and now this power is again conferred by sect 44, sub-sects. 1 and 2, of the Conveyancing Act, 1881, and is made applicable not only to rent-charges, strictly so called, but to all annual sums arising out of any land, whether charged on the land itself or on the income of the land; but it does not apply to any rent incident to a reversion, *i.e.*, connected with tenure, between the parties. This power of distress arises whenever the annual sum or any part of it is in arrear twenty-one days. But in an express grant of a rent-charge payment is usually secured not merely by a power of distress, but further powers are given to enter on the land and receive the income and profits thereof; and sometimes a power is given to the grantee, if the rent is in arrear for a very long period, *e.g.*, two years, to enter on the land and hold the same absolutely. Neither of these powers was conferred by the statute of George II.; but now, by the above section of the Conveyancing Act, if any annual sum charged on land, &c. is forty days in arrear (although no legal demand has been made for payment thereof), the person entitled to receive it may enter into possession of the land and take the income thereof until thereby or otherwise the annual sum and arrears, and all costs and expenses occasioned by non-payment are fully paid; such possession when taken to be without impeachment of waste. This is almost word for word the usual power of entry and reception of rents and profits contained in grants of rent-charges. As to the reason for the insertion of the words "although no legal demand has been made for payment thereof," this is to obviate the necessity of the grantee having to make a troublesome demand for payment, with all its formalities required by the common law, before a proviso for re-entry in case of non-payment of rent could be taken advantage of. (*Duppa* v. *Mayo.*)

4 Geo. 2, c. 28, s. 5; 44 & 45 Vict. c. 4, s. 44.

Distress.

Entry.

Besides the above power, the act gives the grantee another remedy for recovering his rent when it has been in arrear forty days,—a power which is not usually contained in express deeds of grant. This is the power, whether taking possession or not, by deed to *demise* the land charged, or any part thereof, to a trustee for a term of years (with or without impeachment of waste) upon trust—(a) by mortgage; (b) by sale; (c) by demise for all or any part of the term, or (d) by receipt of the income

Further remedies.

of the land, or (e) by all or any of the above means, or (f) by *any other* reasonable means, to raise and pay the annual sum and arrears and the costs and expenses incurred by the non-payment thereof (including the costs of the preparation and execution of the deed of demise and the costs of the execution of the trusts of that deed).

The section only applies to instruments coming into operation after the commencement of the act, and may be excluded or varied.

Registration of rent-charges.

As we have already mentioned, by 18 & 19 Vict. c. 15, s. 12, an annuity granted otherwise than by marriage settlement or will for a life or lives or a term of years, or greater estate determinable on a life or lives, will not affect lands unless a memorandum containing the name, description, and residence of the person whose estate is to be affected, and the date of the instrument creating it, and the amount thereof, is registered at the Central Office; but it has been held under this act that an annuity though not so registered is not void as against a subsequent purchaser of the land who has notice of the annuity. (*Greaves* v. *Topfield.*)

Arrears of rent-charge.

As regards the recovery of arrears of an annuity, or any money charged on land, even when there is a covenant for the payment of it, it would seem only twelve years' arrears can be recovered under 37 & 38 Vict. c. 57, s. 8, and this not only as against the land, but also upon the covenant, and even though the money is secured by a collateral bond; for the old rule that, although the remedy against the land was barred by lapse of time, the remedy upon the covenant remained, seems to have been overruled. (See *Sutton* v. *Sutton*, *Fearnside* v. *Flint*, *Lindsell* v. *Phillips*, and *Alinson* v. *Frisby*, decisions as to the recovery of mortgage money apparently applicable to rent-charges also.)

(7.) *The Assignment of Patents.*

The assignment of patents.

Licences to use patents.

Registration of assignments, &c.

For the assignment of a patent it will always be advisable, if not strictly necessary, to use a deed of assignment. A licence to use the patent should also be under seal. By the Patents Act, 1883, all assignments and licences must be registered at the Patent Office, stating the district to which the patent licence relates, the name of any person having any share or

interest in the patent or licence, and the date of the acquiring thereof, and any other matter affecting the proprietorship therein; and a copy of the entry on the register certified in the prescribed manner will be given to the person requiring it, and will amount to *primâ facie* evidence of the assignment or licence; and until such entry has been made the grantee of the patent will be deemed the sole and exclusive proprietor of it. Any assignee or other person becoming entitled to a patent may procure himself to be registered as the proprietor of it. But even where the assignment is not registered it would seem that the assignee can sue the assignor and licensees from him with notice of the assignment. (See *Hassell* v. *Wright*, a case decided under the Patent Act, 1852.)

Contents of deed of assignment.

The deed of assignment generally contains covenants for title by the vendor which comprise covenants that the patent is valid and subsisting, and not voidable, that the assignor has not previously assigned it or granted any licence to use it, for quiet enjoyment, for further assurance, and that the assignor will aid in procuring a prolongation of the patent term and its extension to other countries. Sometimes, also, he covenants that he will communicate to the assignee any improvements he may from time to time make in the invention the subject of the patent.

(8.) *Assignments of Copyright.*

Assignment of copyright.

The assignment may be as well in writing as by deed (see *Leyland* v. *Steward*), or it may be made under the provisions of the Copyright Act, 1842, s. 13, which provides that the registered proprietor of a copyright may make an entry in the register of assignments in the form given in the schedule to the act, and that such entry will have the same effect, *without being subject to stamp or any other duty*, as an assignment by deed.

Effect of non-registration.

Registration under this act does not affect the validity of the copyright, but the want of registration merely bars the right to sue for an infringement. The assignment includes the right to sell the stock of copies of the book which remains in hand, although the term of the copyright has expired. (*Howett* v. *Hall.*) It does not seem usual to insert any covenants by the assignor in the assignment.

(9.) *Grant of an Advowson.*

Distinction between advowson and next presentation.

You must distinguish between an advowson and the right of next presentation to a benefice. An advowson is the perpetual right of presentation to a benefice, while the next presentation is merely the right to present upon the vacancy which occurs next after the grant. The free alienation of advowsons and next presentations is curtailed considerably by the laws against simony, *i.e.*, the corrupt presentation of anyone to a benefice for money, gift, or reward. By 13 Eliz. c. 6, s. 5, if any person for such consideration presents anyone to a benefice, the presentation will be void, and the crown may present for that turn; but this statute does not prevent the sale of an advowson or even of a next presentation when there is a clerk in actual occupation of the living, even though he be *in extremis* at the date of the grant, *unless the purchase is made with the intention of presenting some particular person.* (See *Fox* v. *Bp. of Chester.*)

In assigning, laws of simony must be regarded.

Simony Acts.

But by 13 Anne, c. 2, a clergyman cannot purchase a next presentation with a view to presenting himself; but he may purchase an advowson, and even an estate for life in one, with such an intention. (See *Walsh* v. *Bp. of Lincoln.*) Further, 3 & 4 Vict. c. 113, s. 42, prohibits spiritual persons from selling or assigning any right of patronage or presentation vested in them by virtue of their office; and (28 & 29 Vict. c. 112) persons about to be instituted or collated to any benefice, or licensed for a perpetual curacy, must make a declaration against simony.

Effect thereof.

In result, then, if a grant of an advowson is made when the benefice is vacant it will not carry with it the right to present for that turn, but the conveyance will be perfectly valid. (See *Alston* v. *Atlay.*) But a conveyance of the next presentation under similar circumstances is void. (*Baker* v. *Rogers.*) An advowson is real estate, and so descends to the heir, but the next presentation is personal estate, and so if the right to present has accrued before the death of the owner, and he dies before presenting, the right to present will (except in the case of a donative advowson) devolve on his personal representatives, and not on his heir. (See *Bennett* v. *Bp. of Lincoln.*) So, also, if the next presentation is sold, and the purchaser dies before presenting, the right to present will pass to

his personal, and not his real, representative. A grant of an advowson or next presentation is made by deed, with the usual covenants for title. Sometimes, when the vendor of a next presentation is a tenant for life of settled estates, as it may happen that the right to present may not occur during his life, provisions are inserted in the grant for the repayment of the purchase-money in that event, or for the payment of interest on the purchase-money until the vacancy occurs; or the purchase-money is invested and the income paid to the purchaser. (*Smith* v. *Meredith*.) The possibility of the next presentation belonging to the Crown, by reason of the incumbent being made a bishop, should be similarly provided for. A person cannot grant an advowson reserving the presentation for his life, nor can he grant the glebe lands or tithes apart from the advowson as a distinct property. If the advowson belongs to joint tenants, the right to present will also belong to them jointly; if it belongs to coparceners, and they cannot all agree as to whom to present, the eldest of the sisters has the right to present on the first vacancy, the second on the next, and so on. Tenants in common must all join in making a presentation.

Grants of advowsons, &c.

In connection with advowsons, you should bear in mind the law as to resignation bonds. On the presentation of a clerk the owner of the advowson may enter into an agreement with the clerk that the latter shall resign when called on by the former in favour of some specified person. But by 9 Geo. 4, c. 94, such an agreement or bond will be void unless it is conditioned that the resignation shall take place only in favour of *any one person named* (whether related to the patron or not), or in favour of one of two persons also named; but in this latter case both the nominees must be by blood or marriage an uncle, son, grandson, brother, nephew, or grand-nephew of the patron; and further, in all cases, one part of such bond must be deposited within two calendar months with the registrar of the diocese, and the resignation when made must refer to the agreement, and state the name of the person in whose favour it is made.

Resignation bonds.

(10.) *Grant of Easements.*

An easement may arise either of necessity (see *Corporation of London* v. *Riggs*), by prescription, or by grant, express or

The creation of easements,

implied. But a person who acquires title to land by adverse possession does not also obtain a way of necessity to such land through adjoining land of the original owner. (*Wilkes* v. *Greenaway*.) When it is created by express grant, as it is an incorporeal right over real property, the instrument creating it must be a deed. The grantor of the easement generally covenants for title. Prior to the Conveyancing Act, 1881, when the owner of land wished to convey the land to a purchaser, and to subject it in his hands to an easement in favour of some third person, the only way in which he could accomplish his purpose was first of all to grant the easement by one deed to that third person, and then by another deed to convey the land to the purchaser, subject to the easement so created. But now, by sect. 65 of that act, he can effect the same result by one deed only: for it provides that the conveyance of land to the use that any person may have, for an estate not exceeding in duration the estate conveyed in the land, any easement, &c. over that land, shall operate to vest the easement in that person. An illustration will make the effect of this section clear. Formerly, if A. wished to grant B. an easement, *e.g.*, a right of way over his estate Blackacre, and also wished to convey the land to C., he would first of all have to grant the easement to B., and then convey the land to C. subject to the easement, thus making use of two deeds. But, under this section, A. could now, by only one deed, grant Blackacre to C., to the use of C. in fee simple, and to the further use that B. might have a right of way over the land. This would vest the land in C. in fee, and the easement in B.

facilitated by the Conveyancing Act, 1881.

(11.) *Conversion of Leaseholds into Freeholds.*

Conversion of long terms of years—when possible;

Sect. 65 of the Conveyancing Act, 1881, makes certain provisions for the conversion into freeholds of long leasehold terms, which are defined to mean terms which, at the time of their creation, consisted of at least 300 years, and which have at least still 200 years to run, where there is no trust or right of redemption affecting the term in favour of the freeholder or other person entitled in reversion expectant on the term, and where there is either no rent at all, merely a peppercorn or other rent having no money value, or where the rent, having originally

had a money value, has subsequently been released or become barred by lapse of time, or in some other way ceased to be payable. And by sect. 11 of the Conveyancing Act, 1882, the above section is to include the above terms, whether they have, as the immediate reversion therein, the freehold or not; but it is restricted, in that it is not to include (1) any term liable to be determined by re-entry for condition broken; or (2) any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

how effected.

As to the mode which the act provides for the converting of such terms into fee simple estates, the following persons are designated by the act as the persons who may execute the deed by which the conversion is effected:—

1. The person beneficially entitled to possession of the land; if such person be a married woman, her husband must concur, unless she is entitled for separate use;
2. The person in receipt of the income as trustee, or who has the term vested in him on trust for sale;
3. The personal representative of a deceased person in whom the term is vested:

Effect of conversion:

Any of the above persons may, whether the term is subject to incumbrances or not, by deed declare that from and after the execution of the deed, the term shall be enlarged into a fee simple, and thereupon such term shall be so enlarged, and the fee will vest in the *person in whom the term* was previously vested.

(a) generally;

But the fee thus created will be subject to all the same trusts, powers, executory limitations over, rights, equities, covenants, provisions, and obligations, to which the term was subject. These obligations, &c. will probably only mean those obligations to which the term was subjected by act of the parties, and not by act of law; so that the fee simple, when obtained, will, in addition to such obligations, become subject to all the obligations which by law are incident to a fee simple estate, but not to a term, *e.g.*, to dower and curtesy, &c. It is also provided that the fee simple, acquired under the section, shall include the fee simple in all mines and minerals which have not at the time of the enlargement been severed or reserved from the land included, and this even if the term was originally created *with impeachment of waste.*

(b) when lease was settled in strict settlement.

Sub-sect. 5 of the section applies to the case where leaseholds have been settled by reference to the freehold land comprised in the same settlement, so as to go along with that land as far as the term permits. If such a term has, under the provisions of the settlement, become vested in any person absolutely, then he, of course, is a person who may, under the description (1) above, enlarge the term into a fee; but if the term has not become thus absolutely vested, then it is provided, that on its being converted into a fee, it shall (without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term) be conveyed and settled in like manner as the freehold land comprised in the settlement, and, until so conveyed and settled, shall devolve beneficially as if it had been so conveyed and settled.

Some decisions on the subject.

It has been held under this section, that an annual rent of three shillings is not a rent having "no money value," so that a term subject to such a rent cannot be enlarged into a fee simple. (*Re Smith and Stott.*) But a silver-penny rent is a nominal rent, and does not prevent conversion. (*Chapman* v. *Hebbs.*)

Stamps.

Stamps on "conveyances on sale."

The subject of stamps on conveyances is now mainly regulated by the Stamp Act, 1891. The time allowed for stamping deeds is thirty days, and the amount of stamp duty on a "conveyance on sale" depends on the consideration, and is, where the consideration exceeds 300*l.*, at the rate of 5*s.* for every 50*l.* or fractional part of 50*l.* The expression "conveyance on sale" includes any instrument, and any decree or order of any court, or of any commissioner, whereby any property, and any estate or interest on any property upon the sale thereof, is transferred to or vested in a purchaser, or any other person on his behalf or by his directions. (As to what is a conveyance on *sale*, see *Doe* d. *Manifold* v. *Diamond*, and *Massey* v. *Nanney*; *Henniker* v. *Henniker*; and the quite recent case *Foster* v. *Commissioners of Inland Revenue.*)

The word "property" includes the goodwill of a business (see *Potter* v. *Inland Revenue Commissioners.*)

When lands are compulsorily taken under the Lands Clauses

Acts, compensation for loss of business forms, for stamp duty purposes, a part of the consideration; but compensation for injury to the adjacent lands need not, it seems, be included. (See *The Commissioners* v. *Glasgow & S. W. R. Co.*) Sections 55 and 56 of the Act should be consulted where the consideration consists of stock and marketable security, or of periodical payments to be charged in respect of the consideration.

Stamp on conveyance of property subject to debt.

Where property is conveyed to any person in consideration of any debt due to him, or subject to a payment or transfer of any money or stock, whether being or constituting a charge upon the property or not, the debt, money or stock is deemed the consideration for stamp duty purposes. (Sect. 57.)

Consequently, if A. conveys an equity of redemption to B. for 1,000*l.*, and B. takes the property subject to a mortgage debt of 1,000*l.*, the duty will be reckoned on 2,000*l.*, and not on 1,000*l.*; and any interest accruing to the date of the conveyance must be included as part of the charge if the purchaser is to pay it.

As to the duty when a mortgagor releases the equity of redemption to the mortgagee, see *Pooley* v. *Goodwin*.

Stamp on conveyance to sub-purchaser.

Where a person purchases property, and before conveyance sells it to another to whom the vendor conveys it, the duty is reckoned on the sub-purchase-money, and not on the original purchase-money, and this whether it be more or less than the original price. (See sect. 58, sub-sect. 4.)

Stamps on contracts for sale.

Sometimes contracts for sale require to be stamped with an *ad valorem* duty on the price agreed to be given. This is in cases where the property passes to the purchaser by the contract without any conveyance (*e.g.*, equitable estates in property). (See fully sect. 59 of the 1891 Act, and *ante*, p. 77.)

Stamps on conveyance of copyholds.

When copyholds are conveyed by deed, the stamp duty is impressed upon the deed, and when by surrender out of court, upon the surrender or memorandum thereof, and if made in court, upon the copy of the court roll of the surrender. (See sect. 61 of the Act.) When freeholds and copyholds are conveyed together, care should be taken to apportion the consideration.

In cases where *ad valorem* duty is not payable, a conveyance of property must be stamped with a 10*s.* stamp.

Stamps on acknowledgments and undertakings.

When a conveyance to a purchaser contains an acknowledgment and undertaking as to deeds, no extra stamp duty is required; but whenever such acknowledgment and undertaking is given in a separate instrument, a 6*d.* stamp is required, or if the instrument is put under seal, a 10*s.* stamp.

Legal Charges.

When charges are on the scale system.

The legal charges in connection with sales and purchases of *freehold*, *copyhold*, or *leasehold* property which you are entitled to make, whether you act for the vendor or the purchaser, will be governed by the Solicitors' Remuneration Act and Order; and the amount allowed you will depend on the purchase-money, and not, as under the old system, on the work done (unless before taking up the business you elect to be paid by that system). Details of these costs you will find in the concluding chapter of this book (see *post*, Part VIII. in Part I. of Schedule I.); and in this place we will merely remind you that if you have negotiated a sale by private contract for your client, the vendor —that is to say, found him a purchaser—or, acting for the purchaser, you have negotiated a purchase for him by private contract—you will be entitled to a commission therefor over and above what you are entitled to for deducing the title, &c., if acting for the vendor, and for investigating the title if acting for the purchaser. Further, if acting for the vendor you conduct a sale by public auction, and so save your client the expenses of an auctioneer, you will be entitled to a commission for that also.

And when they depend on the work done.

In sales and purchases of property, other than freehold, copyhold, and leasehold property, *e.g.*, on a sale and purchase of a life policy or chose in action, your charges will depend on the work done, the folios drawn, and the attendances, &c., in accordance with the old system of charging as altered by Schedule II. to the Solicitors' Remuneration Order.

In cases where the conveyance in fee or for a freehold estate reserves a rent, the costs you will be entitled to will vary on the amount of the rent. (See *post*, Part VIII. in Part II. of Schedule I.)

Before preparing your bill of costs, where the scale charges of the Solicitors' Remuneration Order are applicable, you should study not only the scales but also the rules given at the foot thereof.

In addition to your costs, your client must repay you all costs out-of-pocket, unless you recover them from the other contracting party. As to the expense of the actual execution of the conveyance, the rule is, that the purchaser must bear the costs of the preparation of the conveyance and of all matters relating thereto; but the expenses attending the execution of the deed, by and on account of the conveying parties, must be borne by the vendor, and all expenses of getting in the legal estate and clearing the estate of incumbrances, subject to which it has not been sold, must be borne by the vendor. The expenses attending the acknowledgment of a conveyance by a married woman must be borne by her (the vendor), but the expenses of registering a conveyance in a register county must be borne by the purchaser.

Expenses attending execution.

Part II.—MORTGAGORS AND MORTGAGEES.

We propose to consider this subject in the following way:—

I. The value and nature of the proposed security.
II. The title of the mortgagor.
III. The form and contents of an ordinary mortgage.
IV. The form and contents of mortgages in special cases.
V. Transfers of mortgages.
VI. Reconveyance of mortgages.
VII. Some miscellaneous matters.

I. The Value and Nature of the proposed Security.

(a) As to the amount to be advanced generally.

If your client is the beneficial owner of the money which he proposes to lend, you should ask him if he has had the land, offered as security, valued by a competent surveyor, and inform him it is not advisable to advance more than two-thirds of the estimated value of the property if it be freehold land, and only one-half thereof if it be household property: and you may further point out to him that the risk of the security deteriorating in value depends much on the nature and locality of the property: thus, there is more risk incurred in lending on mills and collieries and other property of like nature, which it may be difficult to let or sell freely, than on a property which from its nature is always likely to find a ready market. And if your client be a trustee proposing to invest trust funds, you must carefully bear in mind the provisions of the Trustee Act, 1893. The effect of sect. 8 of this Act is that when a trustee makes an

(b) Where a trustee advances trust funds—
(i) on land;

investment which is otherwise proper he will not be liable for a breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time of the loan, provided he acted on the report of a practical surveyor or valuer as to the value of the property, such valuer being employed independently of the owner of the property, and the loan was made upon the advice of such valuer or surveyor and did not exceed two-thirds of the estimated value, whether the property was land or houses. It is not necessary that the valuer should be a "local" man. The same Act further lightens the burdens of trustees by providing that a trustee may, in lending on leasehold security (when within his powers, *vide infra*), dispense with the production and investigation of the lessor's title; and that in purchasing, or lending on the security of, property he may accept a shorter title than the title he has a right to insist on, provided that he acts like a prudent and cautious man in accepting a shorter title. (See sect. 8, sub-sects. 2, 3.) Further, when a trustee improperly lends on a security, which at the time of the loan was a proper one (see *Walker* v. *Walker*) for a less sum than he actually lent, the security will be deemed to be an authorized investment for such less sum, and the trustee will only be liable to make good the sum advanced in excess thereof with interest; and this provision is retrospective in its operation and applies to investments made before as well as after the act. (See sect. 9.)

Formerly, there was no hard and fast rule as to how much a trustee might advance with safety; but it was generally considered that he would not be held responsible provided he did not advance more than two-thirds of the value of landed property and one-half of the value of house. (See *Stickney* v. *Sewell; Godrey* v. *Falkner; Whiteley* v. *Learoyd.*) Now, however, as already pointed out, there is a statutory authority for lending up to two-thirds of the value of the property, whether agricultural, house, or other property. (See sect. 8 of the Trustee Act, 1893.) A trustee was not justified in lending on leaseholds without a special power to that effect (*Fuller* v. *Knight;* and see *Smethurst* v. *Hastings*); for long terms of years were deemed not to answer the description of "real securities" within the meaning of the power for trustees to lend on mortgage of real

(ii) long terms;

securities—a power which they often have conferred upon them by the trust instrument, and which, in the absence of any expressed contrary intention in the trust instrument (see *Hume Dick* v. *Lopes*), is now conferred upon all trustees by statute law. (See sect. 1 of the Trustee Act, 1893; *Boyd's Settled Estates; Leigh* v. *Leigh*.) But now a power to invest in "real securities" authorizes and is deemed to have always authorized an investment on mortgage of property held for an unexpired term of not less than 200 years, not subject to any rent greater than one shilling a year, any right of redemption, or any condition of re-entry, except for non-payment of rent. But such a term is, of course, practically as good as property of freehold tenure. Even when trustees had a special power they could not advance more than one-half of the value safely, and they could not advance on the property at all if it was house property which had never been let. (*Hocy* v. *Green*.) But the statutory two-thirds rule now applies to all kinds of property on which trustees are justified in lending the trust funds. They may not, however, unless authorized, advance on personal security, even where they are empowered to invest the trust funds at their discretion (*Pocock* v. *Reddington*), or "on such good security as they can procure and think safe." (*Wilkes* v. *Steward*. See also *Stewart* v. *Sanderson*.) Nor should they lend money on business premises (*e.g.* on a freehold brickfield), without leaving a very wide margin. (See *Whiteley* v. *Learoyd* and *Partington* v. *Allen*.) The power, however, to invest in "real securities" authorizes an investment by way of mortgage on freehold ground rents, and in determining the amount of the advance, the value of the houses may be taken into account. (*Vickery* v. *Evans*.)

As we have seen, it is advisable for trustees to choose their own surveyor, and not leave him to be chosen by you: for should they leave the appointment of surveyor to you, and the security turn out insufficient, they may have to bear the loss. In appointing a surveyor it is perhaps advisable, but not necessary, to select one who has local knowledge of the value of property in the neighbourhood, and the trustees should, according to the judgment in *Whiteley* v. *Learoyd*, before acting upon the valuation, bring their own judgment to bear upon it, though

neglect to do this may not now perhaps be attended by any penal consequences. (Trustee Act, 1893, s. 8.)

(iii) contributory mortgages;

A trustee is not justified in lending money on a contributory mortgage unless specially authorized. (*Webb* v. *Jonas*.) By a contributory mortgage you will understand a mortgage made to secure a sum of money not lent by one lender, or one set of trustees, but subscribed by several persons, or several sets of trustees. It has been recently held that a trustee who advances money on a second mortgage is not necessarily liable for a loss arising therefrom; but to avoid such loss it will lie upon him to show that what he did was under the circumstances reasonable, and what he would have done had the money been his own. (*Want* v. *Campain*.)

(iv) second mortgages.

When a trustee borrows on the trust property—

(i) express authority;

(ii) implied authority;

Important questions affecting the value of the security may also arise when the person who proposes to *borrow* money is a trustee, and the security he offers is a mortgage of the trust estate. A trustee cannot so borrow money unless he is authorized to do so either by the trust instrument, by virtue of an express power, or an implied one therein, or by statute. The implied power to borrow will arise when the real estate is charged with the payment of some sum or other, and the instrument specifies no way of raising a fund to satisfy that charge. Here a trustee or executor generally has an implied power to sell or mortgage. (And see now 22 & 23 Vict. c. 35, ss. 14, 15, *infra*; Dart, V. & P. Vol. ii. 618.) In lending to a trustee or executor under such circumstances, you must note that you will have to *rely on the security alone*, and will have no remedy against the estate generally, and no personal remedy against the trustee or executor. Thus, where a bank lent money on mortgage to an executrix, and, she having overdrawn her account as executrix, the security turned out insufficient, it was held there was no general debt created against the testator's whole estate, and that the bank could not prove against it as a general creditor. (*Farhall* v. *Farhall*.)

(iii) statutory authority.

As to the statutory powers of borrowing, Lord St. Leonards' Act (22 & 23 Vict. c. 35), by sects. 14 to 18, provides, that in the case of a will where the real estate is charged with the payment of debts or legacies, and is devised to trustees for all the testator's interest, the trustees—and, where the estate is not so

devised, the executors—may raise money to satisfy the charge by a sale or mortgage, and in this case the lender is exonerated from the necessity of seeing whether the powers conferred by the statute are duly exercised. Further, sect. 9 of Lord Cranworth's Act (23 & 24 Vict. c. 145) empowered the trustees to raise money when it is required for payments for equality of exchange or for the renewal of leases. This statute, however, is repealed; but powers are conferred by the Settled Land Act, 1882, s. 18 as extended by sect. 11 of the Settled Land Act, 1890, on the tenant for life to raise money for enfranchisement or equality of exchange or partition, and where the tenant for life is an infant, this statutory power is exerciseable by the trustees of the settlement, if any, and if none, by a person appointed by the court. (See sect. 60 of the Settled Land Act, 1882.) Other statutes provide for the obtaining of money, by sale or mortgage of settled land, for the purpose of executing drainage works, or effecting other improvements on the land.

Lastly, the Trustee Act, 1893, s. 19, enables trustees to mortgage for the purpose of raising money to pay for the renewal of the lease of leasehold trust property, and such mortgage may be of the property to be comprised in the renewed lease.

When no statutory authority, lender's duty to inquire whether trustees possess express or implied authority to borrow.

If the lender is not protected by statute from the consequences of not inquiring into the power of the trustee or executor to pledge the trust estate for a loan, or from inquiring into the necessity of raising money, or seeing that the money, when obtained, is applied to the proper purposes, he ought to ascertain by inquiries that such power exists, and that it is properly exercised, and that the borrower is not contemplating a breach of trust. For if the trustee, on obtaining the loan, makes a wrongful application of the money to his own purposes, so as to cause a loss to the trust estate, your client will, in most cases, lose his money, the rights of the *cestuis que trust* being paramount to his rights, seeing that he has, by his neglect, put it in the power of the trustee to commit a fraud, and the equitable maxim being that, where it is a question which of two innocent persons shall suffer for a loss caused by the fraud of a third person, he must bear the loss who put it in the power of the third person to commit the fraud. The circumstances, then, under which the loan is applied for must be taken into account.

If it be applied for, for instance, by an executor a long time after the decease of his testator, as it is only reasonable to presume that after a considerable lapse of time the testator's debts have all been paid, this will amount to sufficient notice to put you on inquiry whether any debts still *do* remain unpaid, and so whether there is any necessity for seeking the loan, and any power to give a *bonâ fide* mortgage for that purpose. (See *Burt* v. *Trueman*; *Satin* v. *Heap*; *Re Tanqueray-Willaume*; but see also *Re Wisstler*; and *Re Venn Furze's Contract*.) The result is, that your client may lose the benefit of his security if he incautiously lends money to a trustee or executor when the circumstances surrounding the transaction indicate or give rise to suspicions that he is not making the mortgage in *bonâ fide* execution of his powers, but with the design of applying the money he may obtain to his own purposes.

Order in value of different securities.

Another point of view from which to regard the value of the security is the nature of the tenure of the property proposed to be mortgaged. Considered thus, they may be said to rank in value in the following order:—1. Freehold land held in fee simple. 2. Freehold fee simple houses. 3. Copyhold land and houses. 4. Long terms of years, where there are no burdensome covenants or heavy ground rents. 5. Property held in fee simple, but used for trade purposes. 6. Life estates. 7. Reversions and remainders. 8. Policies of life assurance. 9. Personal chattels.

Disadvantages of a second mortgage.

Again, even where the property is a freehold estate in fee simple, you must fully understand that it can be mortgaged more than once, and must clearly appreciate how inferior as a security is a second to a first mortgage. The disadvantages of a second mortgage may be enumerated as follows:—

(1) You do not get the legal estate, and thus are exposed to the risk of tacking.

(2) Other mortgages may in some cases be consolidated against you, for the right to consolidate still exists if sect. 17 of the Conveyancing Act, 1881, is excluded from the mortgage deeds or one of them.

(3) You do not get the title deeds.

(4) The first mortgagee may exercise his power of sale without consulting any but his own interests, and by selling

at an inopportune time get but a low price for the estate, and so impoverish your security, and thus you may be compelled to redeem his mortgage in order to protect yourself.

(5) It may turn out that your mortgage is not a second but a third or fourth mortgage, in which case you will be postponed to every mortgagee prior to you in point of time, for the maxim applicable to such mortgagees is "*Qui prior est tempore potior est jure.*"

(6) The first mortgagee may foreclose his security, and then you will either be obliged to pay him off or find your interest in the property foreclosed and shut out.

A few words as to the first, second, and third of these disadvantages:—

The doctrine of tacking—

According to the doctrine of tacking, a prior legal mortgagee, by annexing to his security another which he holds on the same property for a subsequent debt, or an incumbrancer subsequent to the second mortgagee by getting in a prior legal security if he had no notice of an intervening mortgage, may tack the two sums lent together and, squeezing out, as it were, the intervening incumbrancer, is entitled to have both the charges satisfied before he can be compelled to relinquish the security in favour of the second mortgagee. Thus, A. mortgages his estate called Whiteacre to B., then to C., and then to D. D. subsequently buys up B.'s mortgage, and takes a transfer of the legal estate from him. D. can now, if at the time of advancing his money he had no notice of C.'s mortgage, tack the first and the third mortgages together, and thus squeeze out C.'s mortgage. (See the leading cases of *Marsh* v. *Lee* and *Brace* v. *The Duchess of Marlborough.*) The doctrine depends entirely upon the recognition by equity of the power inherent in the legal estate, so that it is only he who has the legal estate, or at least the best right to call for it, who can exercise the privilege of tacking. Thus, as between merely equitable mortgagees, when none of them have the legal estate, there can be no tacking. With regard to tacking, the following points are worthy of note:—

(i) a third mortgage can be tacked;

A third mortgagee who has advanced his money without notice of the second mortgage can take a transfer of the first mortgage and tack his own mortgage to it, even though he has prior to

the transfer received notice of the second mortgage. (See *Marsh* v. *Lee*.) But if the first mortgagee has been paid off he becomes a trustee of the legal estate for the second mortgagee, and the third mortgagee, if he has notice of the fact, cannot, by taking a transfer of the legal estate from the ex-first mortgagee, obtain priority over the second; for it is a breach of duty in the first mortgagee to convey the legal estate to the third, and the latter having notice of that breach will not be allowed to profit thereby. (See *Bates* v. *Johnson*.) A first mortgagee can tack further advances made by him to his original debt, provided he has no notice of the second mortgage, but not if he has notice, even though the original mortgage deed may provide for further advances being made. (*Rolt* v. *Hopkinson*.) But a person who is a judgment creditor, and who afterwards advances money to his debtor on security of a mortgage, cannot (even though he may have got a charge on the debtor's land by means of execution within 27 & 28 Vict. c. 112) tack his judgment debt to the mortgage debt, because, with regard to the judgment debt, he did not originally lend his money on the security of the land. (*Brace* v. *The Duchess of Marlborough*.) Tacking was abolished by the Vendor and Purchaser Act, 1874, but restored by the Land Transfer Act, 1875; and as to lands in Yorkshire, the doctrine of tacking is abolished as from the 1st January, 1885, by the Yorkshire Registry Act, 1884.

(ii) so can further advances;

(iii) but not a mortgage to a judgment debt;

(iv) no tacking in Yorkshire.

It is proper then, in advancing money on a second mortgage, to inquire from the first mortgagee how much is due upon his security, and also, on completion, to give him notice that a second mortgage has been effected to your client, which will have the effect of preventing him from tacking; and if the first mortgagee will permit it, the notice should be endorsed on the mortgage deed, so that it may be notice to a transferee of the first mortgage as well as to the first mortgagee himself. The second mortgagee will still be exposed to the risk of the mortgagor making a third mortgage to a person who has no notice of the second mortgage, and of this third mortgagee taking a transfer of the security of the first mortgagee, in which case he will be able to tack the two securities as against your client.

Precautions to be taken by second mortgagee.

Doctrine of consolidation.

In addition to the risk of being ousted by tacking, a second mortgagee runs a risk of having two or more securities consolidated against him. Consolidation is the right which a mortgagee, in whom there have become vested by transfer or otherwise several mortgages on different properties belonging to the same mortgagor, has to consolidate the several securities, *i.e.*, to refuse to permit the mortgagor, or other person entitled to redeem, to redeem one of the mortgages alone, and to insist on the several properties being, as it were, lumped together and considered as one security for the sum total of the various amounts advanced upon each separate one of the same securities. (*Vint* v. *Padgett.*)

Limits of the doctrine established by case law.

Jennings v. *Jordan.*

It was formerly held that notice of an intervening mortgage of the equity of redemption of one of the properties did not affect this right; but in the case of *Jennings* v. *Jordan* (the principle of which was followed and acted upon in *Harter* v. *Colman*), where one of the mortgages, which it was sought to consolidate, was not created till after the mortgagor had sold the equity of redemption of the estate owned by the person claiming to redeem, it was held that the purchaser could redeem the first mortgage without also redeeming the second. In effect, it was laid down that securities cannot be consolidated as against an intervening incumbrancer of one of the estates, except with regard to those mortgages which were in existence and (see *Harter* v. *Colman*) in the hands of the mortgagee seeking to consolidate them at the time when the intervening incumbrancer became such.

Illustrated.

Consequently, if A. mortgages Blackacre to B. for 1,000*l.*, and subsequently he mortgages Whiteacre to B. for 1,000*l.*, and then A. makes a second mortgage (or sale) of the equity of redemption in Blackacre to C., and subsequently A. mortgages Greenacre to B. for 1,000*l.*, if C. wishes to redeem Blackacre, B. can compel him also to redeem Whiteacre as well, for the mortgage of that estate was in existence when C. acquired the right to redeem Blackacre, and he took subject to all subsisting equities; but B. could not in such a case compel C. (though he might have compelled A.) to redeem also Greenacre, because Greenacre was not in mortgage to B. when C. acquired the equity of redemption in Blackacre.

Cummins v. *Fletcher.*

In *Cummins* v. *Fletcher*, another limitation was put to the doctrine of consolidation by the establishment of the rule that a

mortgagee cannot consolidate securities unless there is a default in payment of the money secured as to all of the mortgages. (See also *Chesworth* v. *Hunt* and *Re Raggett, Ex parte Williams*).

Abolition of the doctrine by Conveyancing Act.

There is not now, however, so much to be feared by a second mortgagee from the risk of an adverse consolidation, for by sect. 17 of the Conveyancing Act, 1881, it is provided that a mortgagor (which includes any person entitled to redeem, and *inter alia* a second mortgagee) may, when seeking to redeem any mortgage, do so without paying any money due under any separate mortgage made by him or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem. This section does not abolish the doctrine of consolidation altogether for the future, for there are saving clauses in the section by which it will still be applicable, viz.:—(1) Where both or all the mortgages are made before the commencement of the act; and again (2) the section will only apply if and so far as a contrary intention is not expressed in the mortgage deeds or one of them. The risk of consolidation is obviously one which must always be run by a second or subsequent mortgagee, for it is a very common practice to exclude the operation of sect. 17 of the Conveyancing Act from mortgages, but it has been held that it cannot be excluded by a solicitor receiving a mortgage from his client unless he first explains the effect of so doing to the mortgagor. (*Climson* v. *Coles*.) It has been held that where a foreclosure action is brought with regard to mortgages of two distinct estates not liable to be consolidated, the costs of the action must be apportioned between the two estates, and the whole costs cannot be made chargeable against each estate so as to prevent the mortgagor redeeming one estate unless he pays the whole costs. (*De Caux* v. *Skipper*, overruling *Clapham* v. *Andrews*.) If sect. 17 of the Conveyancing Act has been excluded, the mortgagee can consolidate his mortgage, though he has given the mortgagor notice under sect. 20 of the Act to pay off one of the mortgages in order to acquire a power of sale, and the mortgagor is prepared to pay and tenders the money. (*Griffiths* v. *Pound*.)

Why consolidation is still a risk.

Second mortgagee gets no title deeds.

The third objection to a second mortgage is that the mortgagee does not get the title deeds. The inconvenience of not having these in your custody or power is obvious. Not only are you

exposed to risk from fraud by the first mortgagee and the mortgagor, but not having legal evidence of your charge on the estate other than your own mortgage deed, your security is clearly depreciated in value.

We will conclude these remarks on the value and nature of the security on which your client proposes to lend money by reminding you that it is no part of your duty to act as valuer in the matter, and if you give your client your idea of the value of the property and he acts upon it, and a loss ensues owing to your estimate being too high, he cannot sue you for damages for negligence, though he would have had that right against a proper valuer, had he employed one and been misled by a negligent valuation. (*Scholes* v. *Brook*.) If the mortgagor's agent represent to the mortgagee what he believes to be the value of the property, and the mortgagee is misled and a loss ensues, the mortgagee could not recover from the valuer unless he could show that the valuer intentionally deceived him, since in this case he would not be suing on contract, but for fraud and deceit. (*Dennis* v. *Lievre*; *Derry* v. *Peek*.)

II. The Title of the Mortgagor.

A strict investigation of title is desirable,

We will now suppose that your client has satisfied himself of the value of the property and the desirability of advancing money upon it, and has instructed you to do all that is necessary to procure a mortgage of it, to be made to him by the proposed borrower. Your first duty will, as upon a sale, be to investigate the title of the mortgagor. In doing so you should, if anything, be more strict in your inquiries and requisitions than you would be upon a sale; for the sole object of the mortgagee is to obtain a thoroughly safe security for his advance, and he should be induced to lend on nothing but an unimpeachable security. A purchaser may have some particular fancy, whim, or taste to gratify in acquiring any particular plot of land; and, so long as he gets what he desires, with a reasonably probable assurance that he is not likely to be disturbed in the possession or enjoyment of the land, he may be content to accept a title which is not

altogether above suspicion. But a mortgagee is not influenced by any such motives. He does not want the land, and however great its attractions may be they have no concern for him. What he wants is something on which he can confidently rely for repayment of the money he lends, in case the mortgagor does not repay him, as it were, out of his pocket. In making these preliminary investigations into the title, you may be as strict in your requirements as you like: the mortgagor is at your mercy in this respect, for there will be no conditions or contract to limit your free right to call on him to show any length of title whatever, and to verify it in the clearest way possible. Your power to insist on the strictest proof is not controlled in any manner by statute, for the 2nd section of the Vendor and Purchaser Act, 1874, does not apply to negotiations for mortgages, but only to sales strictly so called, and in consequence you are quite at liberty to call for the production of a longer title than a forty years' one. Nor does sect. 3 of the Conveyancing Act apply to mortgages. If you are dissatisfied with the mortgagor's replies to your requisitions, or if he refuses to comply with any of your requirements, all you have to do is to withdraw from the matter and refuse to lend him the money.

and is at mortgagor's expense.

Right of investigating title not controlled by statute.

Of course if your client has entered into a distinct contract to lend the money regardless of the title, and he withdraws, he can be sued for damages for breach of contract, but specific performance of such a contract is not obtainable. (*Sichel* v. *Mosenthal.*)

III. The Form and Contents of an Ordinary Mortgage.

It will next be your duty, as the proposed mortgagee's solicitor, to prepare the mortgage deed. The following points should be attended to:—

Points to be attended to in preparing the deed.

Nature of a Mortgage.

A mortgage takes the form of an absolute conveyance with a proviso for reconveyance on the repayment of the loan; it is thus sufficiently an "absolute assignment" to come within

sect. 25 of the Judicature Act, 1873, when the subject of it is a chose in action, and consequently the mortgagee can sue in his own name to recover the chose. (*Tancred* v. *Delagoa Bay Rail.*) The right of the mortgagor to redeem his property on repayment of the loan is an inseparable incident of a mortgage and cannot be severed from it by any agreement of the parties contained in the mortgage deed, the maxim being "once a mortgage always a mortgage." (See *Salt* v. *The Marquis of Northampton.*) Thus, in spite of a proviso that the mortgagor shall redeem during his life, the mortgagor's heir may redeem. (*Jason* v. *Eyres.*) But a mortgagee cannot be compelled to allow the property to be redeemed until the time fixed for repayment has arrived, even though the mortgagor tender the principal with interest calculated up to that date. (*Brown* v. *Cole.*)

The equity of redemption is treated as an estate in land, and may be granted, devised, entailed, and otherwise dealt with. (*Casborne* v. *Scarfe.*)

Taking the heads of a mortgage as they usually occur we find first:—

The Covenant for Repayment of the Loan and Interest.

The covenant to pay.

Its former advantages.

The effect of this covenant is to convert the loan from a simple contract debt into a specialty debt. Formerly, two advantages flowed from effecting this conversion; first, it gave the mortgagee, as a specialty creditor, priority over the mortgagor's simple contract creditors in the administration of the debtor's estate. But this advantage was taken away by 32 & 33 Vict. c. 46, by which creditors, whether simple contract or specialty creditors, are all put on the same footing in administration as regards priority when the debtor dies on or after the 1st of January, 1870.

The other advantage was, that though under a foreclosure decree only six years' arrears of interest could be recovered, under the covenant the mortgagee could recover twenty years' arrears; and though the remedy against the land was lost by lapse of time, the remedy under the covenant remained. (See *Hunter* v. *Nockolds.*) But this advantage has also been in part

taken away by the effect of recent cases: for in the case of *Sutton* v. *Sutton* it was held, that under the Real Property Limitation Act, 1874, an action to recover any money secured by mortgage must be brought within twelve years, and that this was the case whether there was a covenant for repayment in the mortgage or not. And in *Fearnside* v. *Flint* it was held, that it made no difference that the covenant for repayment was contained in some separate instrument from the mortgage, as in a collateral bond by the mortgagor, but that the above rule still applied even in this case, and the action to recover the money secured both by the mortgage and the collateral bond must be brought within twelve years, for the action still practically remained one to recover mortgage money within sect. 8 of the Act of 1874. But if there is a collateral bond by a third person, as against such third person an action on the covenant may, apparently, be brought within twenty years, the action being rather in the nature of an action for damages for breach of covenant than a proceeding to recover the same debt as that secured by the mortgage. (*Re Powers; Lindsell* v. *Phillips.*) But this is by no means certain. (See *Re Frisby*, *Allison* v. *Frisby.*)

Arrears of interest recoverable.

As to the arrears of interest recoverable, it has been laid down by text-writers that only six years' arrears are recoverable, owing to the provisions of 3 & 4 Will. 4, c. 27, s. 42. And this is no doubt so, apart from the covenant; but it is still open to question whether at least twelve years' arrears would not be recoverable when there is, as there always is, a covenant to repay, and possibly, in the case of a surety, for reasons before stated, twenty years' would be recoverable. However this may be, it has been expressly decided that if a mortgagee sells under his power of sale he may out of the proceeds of sale pay himself all arrears of interest (see *Edmunds* v. *Waugh;* and *Marshfield* v. *Hutchings*); and the provisions of 3 & 4 Will. 4, c. 27, s. 42, limiting the mortgagee's right to six years' arrears do not apply to redemption actions, in which it would appear the mortgagor must be prepared to pay all arrears of interest. Further, the provisions of the act relating merely to interest on money charged on land or rent, all arrears of interest in respect of a mortgage of personal property are recoverable, not only in an

action at law as damages for breach of the covenant, but also in a foreclosure action. (See *Brown* v. *Mellersh.*)

How punctual payment of interest may be insured—

The mortgagee may sometimes wish to make punctuality in payment of the interest of advantage to the mortgagor, and to do so, to provide that if he does not pay it punctually at the time stipulated, he shall be bound to pay interest at a higher rate. He cannot do this directly; for if he inserted a condition that the interest should be payable after the rate of five per cent., but, if it was not paid punctually on the date fixed for payment, then it should be six per cent., equity would regard this condition in the light of a penalty, and would relieve against it by allowing the mortgagor to redeem on repayment of the principal and five per cent. But the same object may be effected by stipulating that the rate of interest shall be six per cent., but that, if it is paid punctually, payment at the rate of five per cent. will be accepted. It has been held under such a stipulation that the mortgagee will be entitled to interest at the higher rate, where he has gone into possession through the default of the mortgagor, and received the rent of the mortgaged premises before the day fixed for the payment of the interest. (*Union Bank* v. *Ingram.*) And generally a proviso for the reduction of interest on punctual payment does not apply when the mortgagee takes possession and receives the rents, whether he does so by arrangement with the mortgagor or otherwise, and he will, therefore, be allowed in his account as mortgagee in possession the higher rate of interest, even though there was no interest in arrear when he took possession. (*Bright* v. *Campbell.*) In spite of the doctrines of equity as to penalties, it was held, in *The General Discount Co.* v. *Glegg*, that a commission payable in case of instalments of a loan being overdue might be recovered. The usury laws having been abolished (17 & 18 Vict. c. 90), another way to secure the punctual payment of interest would be to provide for the payment of compound interest. (See *Clarkson* v. *Henderson.*)

(1) by reserving higher rate;

(2) by commission;

(3) by compounding the interest.

As to securing future advances.

Sometimes the covenant to repay is extended, not only to the actual money lent at the time of the execution of the mortgage, but also to advances to be made on some future occasion. In these cases it is not the practice to state expressly the total amount beyond which these advances shall not be extended, but

the mortgage deed is so stamped as to cover a certain sum in excess of that advanced at the time of execution.

As to continuing loan for time certain.

Sometimes, again, provisions are inserted for continuing the loan for a time certain. As a rule the mortgagee can call in his money upon giving a certain notice, and where it is wished that he shall not have this power, or at least have it only in a limited manner, it is usual to make the money payable in the first instance at the ordinary time, *i. e.*, six months after the execution of the deed, but to provide that the mortgagee shall not call in his money before the expiration of the term agreed on, if meanwhile the interest be punctually paid and the mortgagor's covenants duly performed, and, further, that the mortgagor shall not be at liberty to pay off the money before the end of that term, unless the mortgagee agrees to accept it.

As to repayment by instalments.

Again, provision is sometimes made for the repayment of the advance by instalments. In this case, as in the last, it is the practice to make the money payable at the usual time, and then to add a proviso that if the instalments be paid punctually on certain days, with interest on the part not paid off, the mortgagee will not call in the part which is not already paid off. Or else the covenant may be, in the first case, to pay the money off by instalments, and the proviso for redemption makes the premises redeemable on the payment of the advance and interest in the manner mentioned in the covenant, and this is followed by a proviso giving the mortgagee power to call in all the money secured in event of the instalments and the interest not being duly paid—a proviso he can take advantage of in spite of his having, after default made in payment of one of the instalments, accepted payment of interest. (See *Pollard* v. *Steward*.)

Joint account clause formerly necessary in the case of trustees.

The case of several trustees advancing money out of funds owned by them upon a joint account formerly modified the form of covenant, and made it necessary to insert what was called the "joint account clause." The reason for this was, that when several persons advanced money, though they might be joint tenants at law, they were considered as tenants in common in equity of the mortgage debt; so that, on the death of one of them, the mortgagor, on paying off the debt, had to go for a discharge to not only the survivors, but the personal representatives of the deceased person. This was very incon-

venient, and the inconvenience was specially felt in the case of trustees, who form a large proportion of the class of persons who lend on mortgage. It was not a feasible plan to show on the face of the mortgage deed that the lenders were trustees, and that the survivors of them had the power to give receipts, for this would amount to giving general notice that the money was trust property, and so the title deeds relating to the trust would have been incorporated into the title of the mortgagor. To avoid the necessity of stating on the deed that the lenders were trustees, it was the usual practice to insert in the deed a declaration that the money belonged to them upon a joint account, and to provide that the survivor or survivors of them, or the executors or administrators of the survivor, their or his assigns, should be able to give a receipt, which would act as a valid discharge. Though the mortgage deed is not as a rule executed by the mortgagees, and thus the trustees could not be properly said to make the declaration, it is the better opinion that such a declaration would nevertheless be binding on them. (See *Burnett* v. *Lynch.*) This joint account clause, however, is not conclusive, so that in spite of it the mortgage money would belong to the mortgagees as tenants in common if they were entitled to it originally as tenants in common. (*Smith* v. *Sibthorpe.*) The Conveyancing Act, 1881, s. 61, provides that in a mortgage made after the commencement of the act, when the sum advanced is expressed to be advanced by more persons than one out of moneys belonging to them on a joint account, or where the mortgage is made to more persons than one jointly and not in shares, the mortgage money is to be deemed to belong to them on a joint account as between them and the mortgagor, and the receipt in writing of the survivors or of the last survivor will be a good discharge to the payer, even though he has notice of a severance of the joint account. The result is that you may, in mortgages made to persons as joint tenants, omit all reference to the fact that the money is advanced out of moneys so owned: though in practice the words in the covenant for repayment in the testatum, "out of money belonging to them on a joint account," are still constantly inserted, and usefully so, since they preserve evidence of the fact.

Not now required.

Survivorship clause for-

In connection with persons lending money jointly, we may

take the opportunity here of mentioning that prior to the Conveyancing Act, 1881, these persons were seldom mentioned in the deed without their names being followed by the words "or the survivors or survivor of them, or the executors or administrators of such survivor, their or his assigns." The object of this repetition was to make it clear on the face of the deed that the benefit of the provisions in the deed was to survive. But now by that act (sect. 60), with regard to covenants with two or more to do any act for their benefit, it is enacted that they are to be deemed to include an obligation to do that act for the benefit of the survivors or survivor of them, or of any other person to whom the right to sue on the covenant devolves, unless a contrary intention appears.

merly necessary, but not since Conveyancing Act.

The Conveyancing Act, 1881, has another effect on the form of the covenant, as we have already pointed out in a previous page. This is to enable you to omit all mention of the heirs, &c., of the covenantor or covenantee. (See sects. 58 and 59.) Further, the indorsed receipt may now be omitted, just as it may be omitted upon a conveyance on sale. (Conveyancing Act, 1881, s. 54.)

Further effect of Conveyancing Act on mortgages

The Proviso for Redemption, and herein of Foreclosure.

What is known as the proviso for redemption is, in modern mortgages, not strictly speaking a proviso for redemption at all, but a proviso for reconveyance. In older mortgages this proviso was to the effect that the conveyance should be avoided upon the payment of the money secured; but the usual practice of the present day is to provide that upon the mortgage money and interest being paid off the mortgagee will reconvey the premises to the mortgagor or as he shall direct. Formerly, too, this proviso stipulated that the reconveyance should be made by the mortgagee, his heirs or assigns; but it is now unnecessary, and indeed improper (except in mortgages of copyholds, to which sect. 30 of the Conveyancing Act does not apply; Copyhold Act, 1887, s. 45), to insert the word "heirs;" for by the Conveyancing Act, 1881, s. 30, it is enacted that on the death of a sole mortgagee, whether testate or intestate, the mortgaged premises will vest in his legal personal representative, like a chattel

Strictly a proviso for reconveyance.

real, so that in no case will the heir have power to execute the reconveyance. And even if the mortgagee make a will, devising the premises to a devisee, the statute will still prevail, and they will vest, as before, in his legal personal representative. But this does not, of course, prevent the mortgagee dealing as he pleases by his will with the mortgage money as distinct from the legal estate in the mortgage premises.

Mortgagee could not formerly be compelled to transfer;

Another point to note on the wording of this proviso is that formerly the mortgagor could insist upon nothing more than to have it reconveyed. He could not require the mortgagee to make a transfer of the mortgage to some third person on being paid off. Since choses in action were not formerly assignable at law, except by means of a power of attorney enabling the assignee (or transferee) to sue in the name of the assignor (or transferor), it was considered that a mortgagee could not be called upon to run the risk of being responsible for the conduct and costs of an action brought in his name. (*Duncan* v. *Patterson.*) But the risk was an infinitesimal one, and to avoid the rule it was usual to add the words "or as he" (the mortgagor) "shall direct." The risk ceased entirely with the enactment of sect. 25, sub-sect. 6, of the Judicature Act, 1873, whereby an assignee of a legal chose can sue in his own name; and now by sect. 15 of the Conveyancing Act, 1881, it is provided that where the mortgagee is not and has not been in possession, the mortgagor may require the mortgagee not merely to execute a reconveyance to him, but to join in a transfer of the mortgage debt and securities to some third person, at the discretion of the mortgagor, and the mortgagee is bound to concur in the transfer. Under this section a question arose whether the terms of the section would enable a mortgagor or an incumbrancer to insist on a transfer when there were intermediate incumbrances. For instance, if A. mortgaged his property to B., and subsequently mortgaged the equity of redemption to C., and then again to D., it is clear that C. could compel a transfer, but could A. or D.? This question arose in *Teevan* v. *Smith.* To put an end to all doubt on the point, it was enacted by sect. 12 of the Conveyancing Act, 1882, that the right of the mortgagor, under sect. 15 of the Act of 1881, to insist on a reconveyance should belong to and be capable of being enforced by each incumbrancer

aliter since Conveyancing Act.

and by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer is to prevail over the requisition of the mortgagor, and as between incumbrancers a requisition of a prior incumbrancer is to prevail over the requisition of a subsequent incumbrancer.

When settled property is mortgaged, proviso should be to convey to uses of settlement.

If the property mortgaged is in settlement, the proviso should provide that it shall be reconveyed to the uses subsisting under the settlement. Sometimes a question arises on a reconveyance whether it has been the intention, as appears from the proviso, that the reconveyance shall be made to some other persons or for some different estate or interest from the person, or the interests, entitled to the property or subsisting therein at the date of the mortgage. If it is intended to make such an alteration, the intention to do so should be clearly expressed in the deed. If this is not done, but the difference of limitation in the proviso for reconveyance can be explained as a mistake or oversight, or in any way as not intentional, then, in spite of the proviso, the reconveyance will be made so as to vest in the mortgagor the same estate or interest as he had at the date of the mortgage. Thus, if the mortgagor is an owner in fee, and the proviso for reconveyance provides that the reconveyance shall be made to the mortgagor and the heirs of his body, the property will, nevertheless, be reconveyable to him in fee. (See *Innes* v. *Jackson*.)

Proviso for redemption may alter the estate of mortgagor,

but will only do so if intention is very clear.

But if the intention to alter existing uses is evident and clearly desired, then the intention will prevail. (*Anson* v. *Lee; Meek* v. *Chamberlain*.) These questions often arise in cases where lands belonging to a wife are mortgaged to secure debts due from her husband to some third person. The rule is that when this is done, and the equity of redemption is reserved to the husband and his heirs without any further expression of intention to alter the previous rights, the equity of redemption will result to the wife. (*Huntingdon* v. *Huntingdon*.) The rule does not, however, apply where the mortgage is for a term of years, and the proviso for redemption directs that the property shall be reconveyed upon payment to the husband, or to uses other than to the wife, for in such a case the equity of redemption would belong to the husband or other person named. (See *Jackson* v. *Innes; Jones* v. *Davies; Re Belton's Estate*.) As this was so prior to the Married Women's

Property Act, 1882, when the husband had more or less interest in his wife's land, it is so more strongly still since the passing of the act, whereby all the husband's rights in the wife's lands are taken away, at least as to rights accruing since 1882.

Who can redeem.

In connection with the right of redemption, it is necessary to consider by whom this right can be exercised. The right to redeem belongs not only to the mortgagor and the persons specially endowed with it by the provisions of the mortgage deed, but also to all persons claiming under the mortgagor, and all persons having any interest in the equity of redemption. This will include the mortgagor's heir, but not his personal representatives, as such (*Cattly* v. *Simpson*); purchasers of and mortgagees of the equity of redemption; trustees in bankruptcy, and judgment creditors of the mortgagor; sureties for the payment of the mortgage debt; and even a mere lessee of the premises, whose lease, being made by the mortgagor after the date of the mortgage deed, and without any power to make it, is not binding on the mortgagee. (*Tarn* v. *Turner.*) As to redemption by sureties, it was formerly held, that if the mortgagee made a further advance to the mortgagor on the security of the property, the surety could not redeem without paying off the further advance as well as the sum originally lent; but this is no longer the case, and now he may redeem on paying the amount for which he stands surety, and on doing so, is entitled to the benefit of the security taken by the mortgagor, whether or not the creditor has made further advances. (See *Forbes* v. *Jackson.*) If the equity of redemption is settled, the right to redeem belongs to the tenant for life in preference to those entitled in remainder. (*Ravald* v. *Russell.*)

The right to redeem may be lost—

But it should be remembered that, while no clause in the mortgage deed depriving the mortgagor of his right to redeem will be effectual, for "once a mortgage always a mortgage" (see *Howard* v. *Harris; Salt* v. *Marquis of Northampton*), yet the mortgagor may forfeit his right to redeem; for by 4 & 5 Will. & Mary, c. 16, it is enacted, that when a person, having

(1) by fraudulent concealment;

once mortgaged, mortgages again, with intention to defraud, without disclosing the first mortgage to the second mortgagee, he will have no right to relief or equity of redemption as against

the second mortgagee, who will be able to hold the land free from the equity as fully as if he had purchased the land. But this statute being a penal one is construed very strictly, and it has been held that an equitable mortgage by deposit of title deeds, and a further charge without a proviso for redemption, are not second mortgages within the meaning of the act. (See *Kennard* v. *Futvoye*.)

(2) by lapse of time;

Before exercising the right to redeem, the mortgagor must either give the mortgagee six months' notice of his intention to do so, or pay six months' interest in lieu of notice (see *Johnson* v. *Evans*); and by 37 & 38 Vict. c. 57, s. 7, the action to redeem must be brought within twelve years after the time when the mortgagee has obtained possession or receipt of the land, or the rents and profits thereof, unless some acknowledgment of his right to redeem has been given to him in the meantime by the mortgagee in writing, when the action must be brought within twelve years after the date of such acknowledgment. No additional time is allowed for disability. (*Kinsman* v. *Rouse*, and *Forster* v. *Patterson*.) The statute 15 & 16 Vict. c. 86, s. 48 (which empowered the court in a foreclosure action to direct a sale instead of a foreclosure at the mortgagee's request), did not apply to actions for redemption; but now, by the Conveyancing Act, 1881, s. 25, in an action either for foreclosure or redemption, *inter alia*, any one entitled to redeem may obtain an order for sale instead of redemption, and this whether the action is for sale alone, or for sale and redemption in the alternative. The wording of the section is such that in a redemption action the court *must* (if the mortgagor request it) order a sale (*Clarke* v. *Pannell*); and the court, in its discretion, can allow the sale to take place out of court, and this even though the money has been called in, and the time to pay off has expired; but in such a case the court will (1) limit the time within which the sale is to take place; (2) require the reserved price to cover principal, interest, and costs; and (3) require the mortgagor to give security for costs. (See *Brewer* v. *Squire*. As to the compulsory character of this section, see *Clarke* v. *Pannell*.)

(3) by foreclosure decree.

Finally, we may remark that one of the most characteristic remedies of the mortgagee to recover his principal and interest is the right to foreclose the equity of redemption. This fore-

foreclosure is obtained by starting proceedings at any time after the day named for payment in the mortgage deed, claiming that an account shall be taken of what is due under the mortgage, and asking the court to name a time at the end of which, if the money found to be due is not repaid, the mortgagor shall be foreclosed from his equity of redemption. The time fixed is generally six months after the date of the chief clerk's certificate, and if (but it may be enlarged in certain cases) at the end of the time so limited the money is not paid off, then the decree is made absolute, and the result is, that the mortgagee becomes absolute owner in equity as well as at law of the mortgaged property. The court may now order a sale in lieu of a foreclosure on the request of the mortgagee or any person interested in the mortgage money, notwithstanding the dissent of any other person, and in spite of the fact that the mortgagor does not appear in the action, and without allowing any time for the repayment of the mortgage money. (Conv. Act, 1881, s. 25.) This right of foreclosure is incident to a mere equitable mortgage by deposit, with or without memorandum in writing. (*Bolton* v. *Tomlin* and *Oldham* v. *Stringer*.) It does not extend to a pledge of personal chattels, *e. g.*, a deposit of bonds not transferred, the remedy in this case being by sale. (*Carter* v. *Wake*.) But it will be available in cases of a security on shares with power of sale under which the shares are transferred to the lenders. (*General Credit and Discount Co.* v. *Glegg*.)

When the court can order a sale in lieu of foreclosure.

The section further empowers the court to order a sale in any action (whether for foreclosure, redemption, or sale) at the request of the mortgagee or anyone interested in the mortgage money or right of redemption, and that notwithstanding the dissent of any other person, or the non-appearance in the action of the mortgagee, or of any person interested, and without allowing time for redemption or repayment of the mortgage money. This is a far more extensive provision than that contained in 15 & 16 Vict. c. 86. For example, under that act it was only by consent of *all parties* that an immediate sale could be directed (*Wykham* v. *Mason*), though sometimes an immediate sale was ordered in spite of the mortgagor's objections. (*Fowler* v. *Harvey*.)

Now the court can make the order, notwithstanding the dissent

of any person or the non-appearance of the mortgagee or of the mortgagor, and without allowing the ordinary time for redemption. Sub-sect. 4 contains a similar provision to that contained in 15 & 16 Vict. c. 86, that the court may order a sale without previously determining the priorities of incumbrancers; and sub-sect. 3 puts a limit to the feasibility of the mortgagor or person interested in the redemption obtaining a sale, by providing that the defendant, whoever he may be, may apply to the court, and the court may order the plaintiff to give security for costs, and may give the conduct of the sale to a defendant.

The section applies to proceedings brought either before or after the commencement of the act.

The Covenants.

Three usual covenants.

After the proviso for redemption follow the covenants. In an ordinary mortgage these comprise covenants by the mortgagor (1) for title; (2) to insure; (3) to keep in repair.

Covenants for title.

Covenants for title need not now be expressly inserted in the deed, for they are, by the Conveyancing Act, 1881, impliedly incident to it under the same circumstances under which such covenants are incident to purchase deeds. (See *ante*.) That is to say, they will be annexed to the deed when the mortgagor is the beneficial owner, and expressly conveys as beneficial owner.

Four usual covenants for title.

In conveyances by way of mortgage, the covenants which the act implies are, of course, different from the covenants implied in deeds of grant; but they are the ordinary four covenants usually inserted in mortgages, viz., *absolute* covenants for right to convey, for quiet enjoyment, free from incumbrances, and for further assurance, at the cost of the mortgagor so long as any right of redemption exists, and afterwards at the cost of the party requiring the further assurance.

Further covenant in the case of leaseholds.

If the mortgage is of leasehold property, a further covenant is implied similar to that additionally implied in case of a sale of leaseholds—*i. e.*, that the lease is a valid and subsisting one, and that the rent and the lessee's covenants and conditions therein have been performed and observed; and further, a covenant is implied on the part of the mortgagor to pay the rent and observe

the lessee's covenants and agreements as long as any money remains owing on the security of the mortgage, and to indemnify the mortgagee and those deriving title under him therefrom.

Statutory covenant to insure.

A power to effect insurance is made incident to mortgages by the Conveyancing Act, 1881. The power supplied by sect. 19 (ii) is a power at any time after the date of the mortgage deed to insure and to keep insured against loss or damage by fire any building or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance are a charge on the mortgaged property in addition to the mortgage money, *and with the same priority*, and with interest at the same rate as the mortgage money.

When no insurance to be effected.

But an insurance is not to be effected under this power—

(1) Where there is a declaration in the mortgage that no insurance is required.

(2) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed. (Under Lord Cranworth's Act, a mortgagee could effect an insurance when the principal money had remained unpaid for twelve months, even although the mortgagor kept up an insurance in conformity with the terms of the mortgage deed, and this is still applicable to mortgages made in reliance of the statute between 28th August, 1860, and 1st January, 1883.)

(3) When the mortgage deed contains no stipulation as to insurance, and an insurance is kept up by or on behalf of the mortgagor to the amount in which the mortgagee is by the act authorized to insure.

Application of insurance moneys.

The section further provides that the mortgagee may, at his option, require the mortgagor to apply the moneys received under an insurance, effected either under the mortgage deed or the statutory power, in making good the loss or damage in respect of which the money is received, or (without prejudice to any obligation imposed by law or by special contract) in discharge of the money due under the mortgage. The last provisions prevent many questions arising as to the application of the insurance money in case of damage by fire, and contain

similar conditions to the stipulation usually contained in the ordinary common form covenants to insure. The "obligations imposed by law" refer to the stat. 14 Geo. 3, c. 78, by which the insurance office may, at the request of any person interested in the building burnt down, or on any suspicion of fraud, cause the insurance money to be expended in repairs, unless the party insured, within sixty days after the adjustment of the claim, gives security that the money shall be expended, or the money is at the time disposed of to the satisfaction of all parties.

As to amount of insurance.

As to the amount in which the act authorizes the mortgagee to insure under the power, sect. 23 provides that it shall not exceed the amount, if any, specified in the mortgage deed; or, if no amount specified, two-thirds of the amount which would be required, in case of total destruction, to restore the property insured.

Objections to relying on statutory power of insurance.

The advisability of relying on this power to insure has been doubted by some conveyancers, the objections to it being that— (1) The mortgagor may have insured to the amount in which the mortgagee is empowered to insure by the act, and if the mortgagee then insures he will not be able to charge the premiums on the property. (2) On the other hand, if the mortgagee does not insure, it may turn out that the mortgagor has not so insured, in which case there would be a loss in case of fire. (3) Again, the mortgagee has no personal claim against the mortgagor for premiums paid by him (the mortgagee) in case of the mortgagor's default. All he can do is to add them to his principal debt. (4) The act limits the amount of insurance. The result would seem to be that, if it is intended that the mortgagor should effect the insurance, an express power should be given to the mortgagee to insure in default, but if the mortgagee intends to insure himself he may rely on the statutory power, extending it, however, by a clause mentioning the amount in which he may insure, and empowering him to insure notwithstanding any insurance by the mortgagor.

The covenant to repair.

The covenant to repair is not supplied by the Conveyancing Act, and should, in mortgages of buildings, generally be expressly inserted.

After the covenants come powers to the mortgagee—To sell the property; to appoint a receiver; to cut and sell timber; to

grant leases; and in suitable cases the mortgage deed follows with an attornment clause.

The Power of Sale.

Statutory power of sale.

This power gives to the mortgagee one of the most important of his remedies. Before the passing of Lord Cranworth's Act (23 & 24 Vict. c. 145), this power had always to be expressly inserted, except perhaps in mortgages of chattels (see *Re Morritt*), but by that act such a power was made incident, under certain circumstances, to every mortgage executed after the 28th August, 1860. But this provision is now, as to mortgages made since 1881, superseded by the Conveyancing Act, 1881, which, in sects. 19—25, makes certain provisions as to the power of the mortgagee to sell, to insure, to appoint a receiver, and to cut and sell timber. The power to sell does not authorize the mortgagee to sell the trade fixtures set up by a tenant from the mortgagor. (*Saunders* v. *Davies.*) The act provides that the mortgagee shall have these powers where—(1) The mortgage is made by deed. This includes an equitable mortgagee where there is a memorandum of deposit delivered as a deed (*Howe and Hodson's Contracts*); (2) The provisions of the act are not, as they may be, excluded or varied by the terms of the mortgage; and (3) the deed is executed after the 31st December, 1881.

When it arises.

The power of sale arises *when the mortgage money has become due*, and the mortgagee may sell, or concur with any other person in selling, the whole or any part of the property, either subject to prior charges or not, and either together or in lots, and either by public auction or private contract, subject to such conditions as to title, or evidence of title, or other matter, as the mortgagee thinks fit, with power to vary any contract for sale, and to buy in at an auction, or rescind any contract, and to resell without being answerable for any loss occasioned thereby. (Sect. 19 (1).)

The mortgagee, in exercising a power of sale, whether given him by the mortgage deed or conferred by statute law, is not a trustee, and therefore may sell as and when he likes, and is not answerable to the mortgagor for any loss arising from selling subject to depreciatory conditions which may not be necessary

(see *Warner* v. *Jacob*), though he would be liable for loss arising by his being guilty of gross carelessness in the selection of a surveyor or other agent (see *Tomlin* v. *Lance*), and he is liable as the trustee to the mortgagor, or to any second mortgagee, of whose mortgage he may have notice, in respect of any balance he may have after payment of all principal and interest and costs due to him. (See *West London Commercial Bank* v. *The Permanent Benefit Building Society.*)

Whether the mines can be reserved.

Whether the power conferred upon the mortgagee to sell *any part of the property* would enable him to sell the lands without the minerals, or *vice versâ*, is doubtful. Formerly he could do this under 25 & 26 Vict. c. 108, by the court's leave (see *Re Wilkinson*); but this act is now repealed by the Trustee Act, 1893, and although that statute allows trustees, with the consent of the court, to sell the lands without the mines, and *vice versâ* (see sect. 43), it does not appear that a mortgagee is within the definition of a trustee within that act, and in drawing up mortgages it may be well to expressly provide that in exercising his statutory powers of sale this severance of mines may be effected.

When power of sale exerciseable.

Although, as already stated, the mortgagee's right to sell arises directly the mortgage money has become due, yet no sale can be made unless one of the three following events has taken place :—

(a) Until after notice *requiring payment* has been given to the mortgagor, and default has been made in payment for three months (see *Morris* v. *Mercer;* from which it would appear that the notice given should not call upon the mortgagor to repay the money within three months, but rather call upon him to pay off at once, so that the default may begin to run from service of the notice, and enable the mortgagee to sell at the end of three months from such notice, and not upon the expiration of the three months, as might be held to be the case if a so-called three months' notice was given, as in that event the mortgagee would not be in a position to sell until six months had elapsed from the service of the notice); or

(b) Some interest has been in arrear *two* months; or

(c) Until after breach has been committed of some provision

contained in the mortgage other than a covenant to pay the mortgage money or interest.

To whom notice of sale should be given.

Whether subsequent incumbrancers are "mortgagors" within this section, as read with sect. 67 of the act, and whether therefore notice must be given to such incumbrancers, and not only to the mortgagor, is a question of some doubt. (See *Tozer* v. *Buxton*, and *Hoole* v. *Smith*.) And until the doubt is set at rest by judicial decision, it is better in practice to call in the money from all the subsequent incumbrancers of whose incumbrance the mortgagee requiring repayment has notice. The notice requiring payment of the mortgage money, where necessary, must, by sect. 67 of the act, be in writing.

How it may be served.

It may be addressed to the mortgagor by that designation without his name, or generally to the persons interested without any name, and is sufficient notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

The notice may be served by leaving it at the last known place of abode or business, in the United Kingdom, of the mortgagor, or by affixing or leaving it for him on the land, or any house or building comprised in the mortgage.

Service may also be made by post in a registered letter addressed to the mortgagor *by name* at the aforesaid place of abode or business, office or counting-house, if the letter has not been returned through the post-office undelivered. (Sect. 67.)

The interest which a mortgagee can convey under the power.

By sect. 21, a mortgagee, exercising the power of sale, is empowered to convey the property "for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, &c., which have priority to the mortgage." An equitable mortgagee by deposit, even though his memorandum be by deed, and thus able to exercise the power of sale, cannot convey the legal estate under this section (*Howe and Hodson's Contracts*), though able to do so under Lord Cranworth's Act under the like circumstances. (*Re Soloman.*)

The purchaser under the power is protected.

By the same section, a purchaser who takes a conveyance made in professed exercise of the power of sale conferred by the act, gets a title which cannot be impeached on the ground that no case had arisen to authorize the sale, or that due notice was

not given, or that the power was otherwise improperly or irregularly exercised, provided, of course, he acted *bonâ fide*. (*Selwyn* v. *Garfit*; *Bailey* v. *Barnes*.) But any person who is damnified by an unauthorized, improper, or irregular exercise of the power is to have indemnity in damages against the person exercising the power. (See *Aines* v. *Higden*.)

Sect. 21 prescribes the manner in which the proceeds of the sale are to be applied. This is as follows:—

How the proceeds are to be applied.

(i) Prior incumbrances, to which the sale is not made subject, are to be discharged and the balance applied—

(ii) In payment of the proper costs of sale, or attempted sale.

(iii) In discharge of the mortgage money and of any interest and costs or other money, if any, due under the mortgage.

(iv) And the residue is to be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof.

The same section (sect. 21) also makes the following provisions:—

Who may sell.

The power of sale may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money. (This includes the mortgagee, his executors, administrators, and assignees or transferees.)

The power of sale does not affect foreclosure.

The power of sale conferred by the act is not to affect the right of foreclosure. (This provision seems hardly to be necessary, as the act contains nothing to take away or modify the right to foreclose.)

Mortgagee not liable for involuntary loss.

The mortgagee, his executors, administrators, or assigns are not to be answerable for any involuntary loss happening in connection with the exercise of the power of sale.

Title deeds may be recovered.

At any time after the power of sale has become exercisable, the person entitled to exercise the same may recover the title deeds from any person who has them, except a person who has an estate, interest, or right in the mortgaged property entitled to priority over the mortgage.

Mortgagee's receipt to be a good discharge.

And finally, by sect. 22, it is provided that the receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by the act, and

that the person paying the same shall not be concerned to inquire whether any money remains due under the mortgage.

Reliability of the statutory power of sale.

It is advisable to rely on the statutory power of sale, as it is a very reliable one, and, on the whole, fair to both mortgagor and mortgagee.

Absolute power of sale.

Occasionally the power of sale is made exercisable independently of notice or interest being in arrear or contracts being broken, that is to say, sometimes the mortgagee reserves to himself an *absolute* right to sell at any time; but only very exceptional circumstances justify the insertion of such a power, and if a solicitor inserts such a power in a mortgage made in his favour by his client without explaining the effect of the clause to the mortgagor, he would not be able to take advantage of it, or, if he did do so, would render himself liable to an action for damages for any injury thereby sustained by his client. (*Cradock* v. *Rogers*; *Cowburn* v. *Edwards*.)

The Power to appoint a Receiver.

When power to appoint receiver becomes exercisable.

This power, though arising when the mortgage money becomes due (sect. 19), is not to be exercised until the mortgagee has become entitled to exercise the statutory power of sale (sect. 24). When this power of sale becomes exercisable has been already pointed out. (See *ante*, p. 255.)

Appointment of receiver to be in writing.

The appointment is to be in writing under the hand of the mortgagee, who may (subject, of course, to the terms of the mortgage deed on the point, if any) appoint anyone he likes to be the receiver. The remaining part of sect. 24 defines the position, powers, and remuneration of the receiver, and we shall merely give a short summary of them.

Powers of receiver.

(i) The receiver is to be deemed the agent of the mortgagor, who is to be responsible for the receiver's acts and defaults, unless the mortgage deed otherwise provides.

(ii) The receiver is empowered to recover the income of the property in any manner, and in the name of either the mortgagor or the mortgagee, and to give effectual receipts.

(iii) Persons paying money to the receiver are protected in case of his not having authority.

(iv) The receiver may be removed and a new one appointed by writing under the hand of the mortgagee.

Remuneration of receiver.

The receiver may retain, out of moneys in his hand, his commission, which is to be at the rate specified in his appointment, not, however, exceeding 5*l.* per cent. on the gross amount of money received, or if no amount is specified, then at the rate of 5*l.* per cent. on such gross amount, or at a higher rate if the court allows it.

The receiver, if so directed (in writing) by the mortgagee, is to effect insurance of the property out of the moneys received by him.

How moneys received to be applied.

The receiver is to apply moneys received by him as follows:—

(a) In discharging rents, taxes, and other outgoings:

(b) In keeping down annual sums and other payments and interest on all principal sums having priority to the mortgage;

(c) In payment of his commission and the premiums of insurance payable under the mortgage deed or this act, and the cost of necessary or proper repairs directed to be done in writing by the mortgagee;

(d) In payment of interest accruing due in respect of any principal money due under the mortgage;

(e) In payment of the residue to the person entitled to receive the income of the property, subject to the receiver's right to do so.

Advantages of appointing a receiver.

When a mortgagee wishes to obtain the rents and profits of the mortgaged property, it is usual and more advantageous to him to appoint a receiver than to go into possession himself, since if he takes possession he is accountable for all that happens as a quasi-trustee for the mortgagor; whereas if a mortgagee appoints a receiver, as shown above, the receiver is the agent of the mortgagor, who would be accountable for his acts. The mortgagee must make up his mind which course he will adopt, for it has been held that a mortgagee who has himself been in possession cannot go out of possession and appoint a receiver. (*Prytherch* v. *Williams.*)

The last power which this section gives to a mortgagee is

The Power to Cut and Sell Timber.

When the power to cut timber is exercisable.

This is a power to the mortgagee *while in possession* to cut and sell timber and other trees ripe for cutting, not being ornamental ones, nor trees planted for shelter, and also to make contracts for the cutting and sale of the same, provided such contracts are to be completed not later than twelve months from the making thereof. This power is an entirely new one, and was not mentioned in Lord Cranworth's Act. The law formerly existing, as laid down by the courts, was, that a mortgagee in possession could not waste the estate (*Hanson* v. *Derby*), and if he proceeded to fell timber, the court would, on the mortgagor's application, decree an account, and order the produce of the timber to be applied in payment of interest in arrear, if any, and then in reduction of the principal. And, again, the mortgagor could obtain an injunction to prevent the mortgagee felling timber, unless the security was defective. In this case the mortgagee would not be restrained; but, of course, the produce of the sale of the timber was applied in reduction of the money due under the mortgage. (*Witherington* v. *Bankes.*) Under the new act, the mortgagee, while in possession, may apparently cut and sell timber, or contract for its sale, whether the security is or is not insufficient, and cannot be restrained by injunction on the ground that the security is sufficient; and though there is no express direction as to what is to be done with the proceeds of the sale, they must presumably be applied in reduction of the interest and principal secured by the mortgage.

Old law.

Present law.

All four statutory powers may be varied or excluded.

Now with regard to the whole of these powers which we have just been discussing—the powers to sell, to insure, to appoint a receiver, and to cut timber—it is provided by sect. 19, sub-sect. 2, that they may be varied or excluded by the mortgage deed, and as so varied or excluded shall, as far as may be, operate in the like manner, and with all the like incidents, effects and consequences, as if such variations or extensions were contained in the act. And, again, sect. 19, sub-sects. 3, 4, declare these powers are only to become applicable if and so far as a contrary intention is not expressed in the mortgage deed, and subject to its terms and provisions, and that they only apply

where the mortgage deed is executed after the commencement of the act, *i. e.*, after the 31st December, 1881.

The Power to Grant Leases.

Old law as to leasing—

We next come to the powers to grant leases. Before the passing of the Conveyancing Act, 1881, the state of the law on the subject was as follows:—(1) As to the mortgagor—as he is only a tenant at will to the mortgagee—he could not make a valid lease so as to bind the mortgagee, and if he did make one, the mortgagee could eject the lessee without notice (*Keech* v. *Hall*), unless, indeed the lessee was prepared to redeem him. (*Tarn* v. *Turner*.) In such a case, however, if the mortgagee accepts rent from the tenant, though thereby he does not confirm and adopt the lease, yet he recognises the right of the tenant to the possession, and a yearly tenancy arises, and the terms of the lease, as far as applicable to such a tenancy, apply. (*Birch* v. *Wright*.) And (2), as to the mortgagee, though he is legally the owner of the property, he could not, without an express power, grant leases which would be binding in equity on the mortgagor; that is to say, the mortgagor could, on redeeming the property, eject the tenant. So that, practically, when property was in mortgage, the only way in which a valid and binding lease could be granted was by the mortgagor and mortgagee both joining in the lease, or by virtue of an express power of leasing, which was often inserted in mortgages comprising an extensive property.

(i) by mortgagor;

(ii) by mortgagee.

Statutory provisions as to leasing.

The Conveyancing Act, 1881, s. 18, now enables either the mortgagor (being in possession) or the mortgagee (being in possession) alone to make demises of the mortgaged land, and to execute and do all assurances and things necessary or proper in that behalf, subject to the following restrictions:—

(i) The term is not to exceed—

Twenty-one years for an agricultural or occupation lease.

Ninety-nine years for a building lease.

(ii) The lease is to take effect in possession not more than twelve months after its date.

(iii) The best rent is to be reserved and no fine taken.

(iv) The lease is to contain a covenant by the lessee for payment of rent, and a condition of re-entry if the rent remains unpaid for thirty days at the longest.

(v) The lease is to be executed in duplicate, and a counterpart delivered by the lessee to the lessor.

(vi) If it is the mortgagor who makes the lease, he is, within a month of making it, to deliver to the mortgagee, or if there be more than one mortgagee, to the first mortgagee in priority, a counterpart lease duly executed by the lessee. Such a lease, when granted by the mortgagor, is to be valid as against every incumbrancer (which includes the mortgagee), and, when granted by the mortgagee, is to be valid against all prior incumbrancers and the mortgagor.

Power can be excluded.

But it is again to be noticed that the section only applies so far as a contrary intention is not expressed by the mortgagor and the mortgagee, either in the mortgage deed or otherwise in writing. This somewhat detracts from the usefulness of the section, and will make it necessary for an intending lessee to inquire (if he may be allowed to do so, which the 2nd section of the Vendor and Purchaser Act, 1874, and the 13th section of the Conveyancing Act, 1881, seem to preclude) whether the provisions of the act have been excluded. Again, this section is not to prevent powers of leasing being given by the mortgage deed itself to the mortgagor or mortgagee, or both, and of course such express powers exclude the operation of the implied powers given by the act.

Practice of conveyancers herein.

Conveyancers differ in their views as to the desirability of retaining in or excluding from mortgages the benefit of the section. Some adopt the plan of excluding the section entirely, others adopt it entirely, while a third class of practitioners, and perhaps the majority, retain the benefit of the section as far as the mortgagee is concerned, but exclude the section as far as it allows the mortgagor to make leases, deeming it undesirable to allow the mortgagor the opportunity of making a lease subject to the terms of which the mortgagee will have to exercise his remedies.

How far retrospective.

The section applies to mortgages made after the commencement of the act, and also to mortgages made before, if it is

agreed that it shall apply in a writing made, after the commencement of the act, between the mortgagor and the mortgagee.

Note, also, that the act authorizes the making a mere verbal letting or lease, and also an agreement for a lease, whether written or not; but of course it does not affect any enactment which requires a lease to be by deed or in writing.

Qy. Must a lease under the section be by deed?

Although this section provides for the best rent being reserved, yet there is an exception in the case of building leases, on which a mere nominal rent may be reserved for the first five years. The effect of this is very serious in the case of a lease by the mortgagor, since it practically deprives the mortgagee of all chance of getting his interest out of the income of the property for the five years.

When nominal rent may be reserved.

Where the mortgagor makes a lease under the Conveyancing Act powers, the mortgagee, on giving notice to the tenant and going into possession, is entitled to enforce the covenants and conditions of the lease just as if he had been a party to it, and his right cannot be affected by a collateral agreement between the lessor and the lessee. (*Municipal, &c. Building Society* v. *Smith.*)

The Attornment Clause.

The object of this clause is to give the mortgagee an additional remedy for the payment of the interest on the mortgage debt. This object is achieved by the mortgagor (who, to render the clause of any use, must, of course, be in possession) expressly constituting himself in the deed a tenant of the mortgagee of the mortgaged premises at a yearly rent equivalent, as a rule, to the annual amount of interest. The result is that the mortgagee is enabled to treat the mortgagor just as any ordinary lessor would treat a lessee, and if the rent, or in this case the interest, is in arrear, to distrain upon the property on the premises, and so recover the arrears by a self-remedy. Sometimes, instead of an attornment clause, a power or licence to distrain is given to the mortgagee. Of these two schemes, both have their advantages and disadvantages. Thus, as to the attornment clause, it is not transferable by the mortgagee (*Brown* v. *Metropolitan Life Assurance Co.*), while the power of

The object of the attornment clause.

The power of distress clause.

Comparison of the two clauses.

distress apparently is so. Again, the attornment clause is said to make the mortgagee liable to account to other incumbrancers for the rent which might have been received by him, on the ground that he is in the same position as a mortgagee in possession. (See *Re Stockton Iron Furnace Co., Ex parte Punnett; Ex parte Harrison, Re Betts.*) But *Stanley* v. *Grundy* decided that this obligation is not cast on the mortgagee unless he has actually exercised his right to distrain. The great advantage, however, of the attornment clause is that it enables the mortgagee to effect his distress on all the goods which happen to be on the premises, whether they are the goods of the mortgagor himself or the goods of a stranger (*Kearsley* v. *Phillips*), while the power of distress is a mere licence, and only authorizes the seizure of goods belonging to the mortgagor. (*Freeman* v. *Edwards.*) And again, the power of distress is avoided by the bankruptcy of the mortgagor, which vests his goods in his trustee, but under the attornment clause the mortgagee may distrain for arrears of rent under the same conditions as any ordinary landlord.

Great advantage of the attornment clause.

Effect of Bills of Sale Act on the clause.

The insertion of the attornment clause is not now altogether to be recommended: for it has been decided in *Ex parte Kennedy, Re Willis*, that an attornment clause contained in a mortgage of land is a bill of sale, and the result is that, under the Bills of Sale Act, 1882, it must be registered in a certain way, and so publicity given to the transaction, which the mortgagor would not desire or permit. Further, it seems impossible to frame the attornment clause in such a way as to make it comply with the statutory form in which all bills of sale to secure money must be drawn under sect. 9 of the 1882 Act, but perhaps in such a case the statutory form need not be followed (see *dictum* in *Green* v. *Marsh*); but even if this is so it is by no means certain that by registering the mortgage as a bill of sale it might not become void altogether, as a registered bill of sale ought to comprise personal chattels only. (See *Cochrane* v. *Entwistle.*) The non-registration of the mortgage as a bill of sale will not invalidate—as was at one time thought—the mortgage as far as the land is concerned (*Re Burdett, Ex parte Byrne*), yet if your client, the mortgagee, acts on the clause he will be a trespasser and liable in damages. And it has been decided (*Mumford* v.

Collyer) that the Bills of Sale Act does not render the ordinary attornment clause in mortgages void altogether so as to destroy the relation of landlord and tenant created by it between the mortgagee and mortgagor. Therefore under such a clause the mortgagee, although the mortgage is not registered as a bill of sale, can give the mortgagor notice determining the tenancy, and can then, without doubt, sue by specially indorsed writ for possession and mesne profits, and apply for a speedy judgment under Ord. XIV. of the Judicature Rules. There is then, perhaps, some advantage in making use of the attornment clause, for though, in the absence of an attornment clause, the mortgagor is the tenant at will of the mortgagee, and so there does not seem any reason why the mortgagee should not sue as landlord to recover the premises by a specially indorsed writ whether the attornment clause is in or not, on the whole, no harm will be done by inserting it.

About the power of distress, too, there is some doubt. Some think that if such a power is given, without at the same time reserving a rent, this would not fall within the 6th section of the Bills of Sale Act, 1878. But this seems to be very doubtful.

Pitfalls to avoid when inserting the clause.

If you do decide to insert the attornment clause, you should take care not to frame it so as to prevent the mortgagee from entering without notice and determining the tenancy. (See *Brown* v. *Metropolitan Life Assurance Society*.) Again, you must not fix the supposititious rent at an amount preposterously exceeding the annual value of the property; for if it is so grossly out of proportion to that value, it will be held to be a sham rent, and accordingly void as a fraud on the bankrupt law. (See *Ex parte Williams*, and *Re Stockton Iron Furnace Co.*) Note, too, that an attornment may be made to a second mortgagee (*Morton* v. *Woods*); and this even though there is subsisting a previous attornment to a first mortgagee. (*Ex parte Punnett.*) Further, the proceeds of the distress, when levied, may be applied not only in satisfaction of the interest in arrear, but also in payment of the principal. (*Ex parte Harrison.*)

The following are copies of the form of an ordinary mortgage deed, and of a further charge given in the Fourth Schedule to the

Conveyancing Act, 1881, forms which, in your practice, you will usually find quite sufficient and reliable.

I.—*Mortgage.*

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal half-yearly payments on the day of and the day of AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption following (namely) that if *A.* or any person claiming under him shall on the day of 1882 pay to *B.* and *C.* the sum of £ and interest thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under them will at the request and cost of *A.* or the persons claiming under him re-convey the premises to *A.* or the persons claiming under him And *A.* hereby covenants with *B.* as follows [*here add covenant as to fire insurance or other special covenant required.*]

In witness &c.

II.—*Further Charge.*

THIS INDENTURE made the day of 18 between [*the same parties as the foregoing mortgage*] and supplemental to an indenture of mortgage dated the day of 18 and made between the same parties for securing the sum of £ and interest at [*four*] per centum per annum on property at [*&c.*] WITNESSETH that in consideration of the further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account [*add receipt and covenant as in the foregoing mortgage*] and further that all the property comprised in the before-mentioned indenture of mortgage shall stand charged with the payment to *B.* and *C.* of the sum of £ and the interest thereon hereinbefore covenanted to be paid as well as the sum of £ and interest secured by the same indenture.

In witness &c.

IV. The Form of the Mortgage in Special Cases.

Mortgage of a Life Estate.

Mortgage of life estate, how effected.

A mere life estate in lands is obviously not a desirable security, but it is sometimes accepted in conjunction with a policy of assurance on the life of the mortgagor as a security for a loan. When a life interest is mortgaged it is not the practice to have it assigned absolutely subject to a proviso for redemption to the mortgagee, but a demise is usually made of the land to him "for the term of a hundred years if the mortgagor shall so long live." The object of this is, that the powers of leasing, consenting to sales, &c., annexed to the life estate, shall not be affected. But since the Settled Land Act, 1882, it would not seem to make much difference whether the mortgage is by demise or by assignment of the whole life interest; for by sect. 50 the powers given by that act remain exercisable by the life tenant, notwithstanding any assignment, nor can he contract not to exercise them. At the same time, the above section will not operate so as to prejudice the interests of the mortgagee without his consent, except that the tenant for life while in actual possession can make leases of the land at the best rent that can be obtained without fine, and in other respects in conformity with the act.

How position of mortgagee affected by Settled Land Act.

Mortgages of Copyholds.

Mortgages of copyholds, how effected.

Mortgages of copyhold land are effected by a surrender containing a condition that it shall become void upon the payment of the debt and interest on a specified day. The mortgagee is not as a rule admitted, for this gives him no advantage unless he wishes to realize his security, and until this occurs admittance will be unnecessary and will further render him subject to the necessity of having to pay the fine due to the lord on admittance. The surrender is accompanied or preceded by a deed of covenant to surrender, in which are embodied the usual mortgage clauses, and into which the Conveyancing Act, 1881, imports covenants for title, and also the power of sale, and all the other clauses which it supplies to the more ordinary instances of mortgages of

Query, whether sect. 7 of Conveyancing Act, 1881, applies.

freehold lands. At one time some doubt existed whether the Conveyancing Act applied to copyholds proper, but this doubt seems to have passed away, and we think you may safely rely on the statutory powers, &c. of that act, provided there is a covenant to surrender, since in the definition section of the act, conveyance includes "covenant to surrender," and land includes lands of every sort of tenure.

Declaration of trust until surrender.

If the mortgage precedes the surrender by even a short length of time, it is usual to add to it a declaration by the mortgagor that he will stand seised of the premises until the surrender on trust for the mortgagee, his heirs and assigns, subject to the same equity of redemption as they would have been subject to had the surrender been already made; for this will enable the mortgagee to obtain the legal estate under the Trustee Act, 1850, by an order, in case the surrender is not duly made by the mortgagor. This of course will not be necessary when the money is not advanced (as it should not be) until the surrender is effected.

Entry of satisfaction on court rolls.

On the mortgagee being paid off, if he has not been admitted, all that is necessary to revest the land in the mortgagor is to enter an acknowledgment of satisfaction on the court rolls, and it is also advisable to endorse a receipt for the money on the deed accompanying the surrender.

Mortgages of Leaseholds.

Mortgages of leaseholds may be by assignment or underlease.

Whether a mortgage of leaseholds shall be effected by an assignment or an underlease depends on the nature of the rent and covenants contained in the lease.

Respective advantages and disadvantages.

The assignee of a lease becomes liable for the rent and covenants contained therein as far as they affect the land, whereas an underlessee does not become so liable. Thus, then, if the rent and covenants of the proposed leasehold security are burdensome, it would obviously be disadvantageous to the mortgagee to take his security by way of assignment; but at the same time there is also this drawback to taking an underlease, that the mortgagor may commit some breach of covenant in the lease involving forfeiture, in respect of which, however, the mortgagee or underlessee can now apply for relief under sect. 14 of the Conveyancing Act, 1881 (see sect. 4 of the Conveyancing Act, 1892, overruling *Burt* v. *Gray*): but this would entail

expense and trouble, and relief can only be given him in the form of putting him in the position of the lessee with all his liabilities, by vesting the lease in the mortgagee for a term not exceeding the term of the underlease; so that where the rent and covenants are not specially onerous an assignment of the whole term affords the better security of the two. As a rule, in practice the mortgage is made by underlease. When this form is adopted, the deed should contain a declaration of trust by the mortgagor of the residue of the term for the benefit of the mortgagee and persons claiming under him, and also a power of attorney authorizing the mortgagee to assign that reversion to himself or any one else subject to the equity of redemption, if that should be existing at the time it is proposed to exercise the power. Should the property consist of renewable leaseholds it may be advisable to insert an express covenant by the mortgagor to renew on the request of the mortgagee, and to assign the property comprehended by the renewed lease to the mortgagee subject to the subsisting equity of redemption. But such a covenant is not absolutely necessary; for though in its absence the mortgagee cannot compel the mortgagor to renew, he can effect a renewal in his own name, and hold the renewed lease as a security not only for the mortgage debt and interest, but for the costs of renewal and interest thereon. (See *Lacon* v. *Mertins*.) And if the mortgagor renews the mortgagee is entitled to the benefit of the renewed term for the purposes of his security. (*Rakestraw* v. *Brewer*.)

In practice such mortgages are usually by underlease.

In connection with a mortgage by way of underlease the provisions of the Bankruptcy Acts, 1883 and 1890, must be borne in mind. Under these acts, should the mortgagor become bankrupt and his trustee disclaim the lease, the effect on the underlease will be that the mortgagee will either have to lose his security, or he will have to take a vesting order, and so be bound to perform the covenants and pay the rent contained in and reserved by the original lease; for the disclaimer does not prevent the original lessor from entering upon the land under the condition of re-entry contained in the original lease. (Sect. 55; and see *Ex parte Walton*, *Re Levy*.)

Effect of bankruptcy on a mortgage by underlease.

And, further, it is expressly provided by the act that if the underlessee, on leave to disclaim the lease being sought from the

court, seeks the court's assistance, the same can only be given him on the terms that the original lease vests in him, subject to the same liabilities and obligations as if the lease had been assigned to him at the date when the bankruptcy petition was filed, and (if the case so requires) as if the lease had comprised only the property comprised in the vesting order, and then he would become entirely responsible to the lessor on the original covenants as to anything done after the date of the petition. The lessor, too, can apply to the court for an order vesting the disclaimed lease in the mortgagee on terms. (*Re Cock, Ex parte Shilston.*) These provisions materially detract from the value of mortgages by way of underlease, and have induced many practitioners to adopt an assignment instead of an underlease.

Mortgages of Reversions.

Disadvantages of mortgages of reversions,

Reversions and remainders, whether vested or contingent, are by no means desirable securities, as they are of such a nature that they afford the mortgagee no protection in the way of taking possession of the property (and indeed, if they are contingent they may never come into possession at all); and again, they furnish no present existing fund to which the mortgagee can resort for payment of the interest or principal in event of the mortgagor's default. And, further, the mortgagee gets no title deeds if the reversion or remainder is dependent on a particular estate of freehold, and is thus subject to the risk of being postponed to some legal incumbrance previously created by the mortgagor. If the mortgage is of a reversionary interest in stock, a distringas ought to be put upon the stock, and if it is of a fund in court a stop order should be applied for. It must be remembered, too, the mortgagee of a reversion stands in the same position as the purchaser of a reversion as regards unconscionable bargains. He can only claim the amount he actually advances, with reasonable interest and costs. (See *Re Slater's Trusts.*)

Mortgages of Life Policies.

and of mortgages of life policies.

Mortgages of policies of life assurance are generally taken in conjunction with mortgages of life estates in land; they are sometimes, however, taken alone; but in this case they are but

inefficient securities, as during the mortgagor's life there is no fund for the mortgagee to rely on, and the mortgagor may omit to pay the premiums, or do some act to make the policy fall through. If such a policy is taken as a security, and it is one which has been effected some time before the date of the mortgage, you should take the precaution of inquiring at the office of the company if they have notice of any previous incumbrance. Whether the policy is a previously existing one, or one effected for the immediate purpose of mortgaging it, the mortgage will be effected by assignment, and, immediately on completion, notice must be given to the assurance company, for otherwise a subsequent incumbrancer who does give such notice will obtain priority if he is unaware of your mortgage. (See *Consolidated Investment Co.* v. *Riley;* and 30 & 31 Vict. c. 144, s. 3.)

Covenants required.

The assignment should contain covenants by the mortgagor not to do anything which may avoid the policy; to restore it if by any means it becomes voidable; and to effect a new insurance in the name of the mortgagee if it becomes void; and to pay the premiums, and deliver the receipts therefor to the mortgagee; a power to the mortgagee to pay the premiums if he makes default, and a covenant that, on the mortgagee doing so, he, the mortgagor, will on demand repay them with interest and expenses. If the policy is mortgaged in connection with land, there should be a charge of these expenses on the land until repayment. (See *Re Leslie.*) But the mortgagee, even in the absence of stipulation, is entitled to charge the property with any sums he may advance to keep up the policy, with interest thereon at 4 per cent. (See *Bellamy* v. *Brickenden; Falcke* v. *Scottish Imperial Co.; Tippett* v. *Strutt.*)

Mortgagee's rights as to premiums paid.

Statutory Mortgages.

When statutory mortgages may be relied on.

Where the case is a simple one, and the amount of the loan is small, so that the saving of expense is an object, you may, with advantage, have recourse to the short form of statutory mortgage provided by the Conveyancing Act, 1881. By sect. 26 of this act, a statutory form of mortgage (*vide* Part I. of the Third Schedule to the act) is provided, and is applicable to freehold or

leasehold land. The deed must be expressed to be made by way of statutory mortgage, and be in the form given in the schedule, with such variations and additions as shall be necessary. And in this statutory mortgage, if the mortgagor is expressed to convey *as mortgagor*, there are to be deemed implied—

What covenants, &c., are implied,

(1) A covenant by the mortgagor to the mortgagee to pay the mortgage money at the stated time, with interest thereon at the stated rate, and thereafter, so long as the mortgage money remains unpaid, to pay interest thereon at the stated rate, by equal half-yearly payments.

(2) A proviso for re-conveyance if the mortgagor pays the principal and interest on the stated day.

and what powers.

Besides this, sects. 19 to 24 import into this statutory mortgage power (a) of sale; (b) of insurance; (c) powers to appoint a receiver; and (d) to cut timber; and by sect. 7 absolute covenants for title are supplied, if the mortgagor is expressed to convey as beneficial owner.

Effect of implied covenants on statutory mortgages, &c.

Sect. 28 contains a provision as to the effect of the implied covenants in statutory mortgages or statutory transfers, where—

(a) More than one person are expressed to convey as mortgagors, or to join as covenantors;

(b) The covenant is made with more than one mortgagee or transferee.

In case (a) the covenant implied is to be deemed a covenant by the mortgagors or covenantors *jointly and severally;* in case (b) the covenant is to be deemed a covenant with the mortgagees or transferees jointly; so that, in suing on it, all the mortgagees or transferees must be joined, and the benefit of the covenant survives on the death of one. But if the amount secured by the mortgage is expressed to be secured to the mortgagees in shares or distinct sums, then the implied covenant is to be several in respect of the share or distinct sum advanced by each mortgagee.

Even if you do not prepare your mortgage exactly in accordance with this form, you will find it desirable to always express the mortgage to be made "by way of statutory mortgage," since if these words are in, but not otherwise, you will be able hereafter, if desired, to transfer the security by means of the statu-

tory transfer to recover the property by means of a statutory re-conveyance. (See *post*, p. 284.)

The following is the form of a statutory mortgage, as given in Schedule III. Part I. to the Conveyancing Act, 1881—

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [*&c.*] of the one part and *M.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883, of the principal sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

*** *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

Equitable Mortgages.

When used.

Sometimes a temporary loan is wanted under the pressure of most urgent need, and there is no time in which to prepare a regular formal mortgage. Under these circumstances an equitable mortgage may be resorted to.

How created.

Such a mortgage may be created. (1) by an agreement, in writing, and signed as required by the Statute of Frauds (sect. 4) showing the intention to charge the property, no special words of charge being required so long as the intention is clear. (See *Cradoch* v. *The Scottish Provident Institution*); or (2) by a deposit of the title deeds, or a material portion of them (*Lacon* v. *Allen*), without any writing (*Russel* v. *Russel*), provided the deposit and the parol agreement relating to it are made at one and the same time. (*In re Broderick, Ex parte Bretham*); or (3) by a deposit of the title deeds, accompanied with a memorandum of deposit. A mortgage by deposit has been deemed to have been effected where only one old deed was deposited, where it was described, though falsely so, as being the only deed. (*Dixon* v. *Muckleston.*) And again, it has been held that where a written order was given by A. to B., directing C., a prior equitable mortgagee, to deliver the title deeds to B. as soon as C.'s lien on them was satisfied, this created a valid equitable mortgage. (*Daw* v.

Terrel.) And in cases of an intention to prepare an ordinary mortgage, where the deeds are delivered to the proposed lender or his solicitor for the purpose of preparing the mortgage, this delivery will operate as an equitable mortgage of the premises should the money be advanced before the execution of the formal mortgage. (*Edge* v. *Worthington.*)

Form of memorandum.

An equitable mortgage, however, is usually made by a deposit accompanied by a memorandum thereof, by which the time for repayment is fixed, and the rate of interest regulated, and by which the mortgagor usually expressly agrees to execute a legal mortgage if called upon. The memorandum should also provide as to the notice the mortgagor must give to the mortgagee if the money not being paid at the time fixed he subsequently wishes to pay off the mortgage, since in the absence of some stipulation as to payment, the mortgagor need not, as in the case of a legal mortgage, give six months' notice, but merely a *reasonable* notice. (See *Fitzgerald Trustees* v. *Mellish.*)

Sometimes this memorandum is put under seal with a view to make the mortgage one by deed within sect. 19 of the Conveyancing Act, 1881. (See *Howe and Hodson's Contracts, infra.*)

A deposit even without memorandum may extend to future advances.

Questions have arisen whether a mere deposit of the deeds without any memorandum will afterwards extend so as to secure future advances, and it has been held that parol evidence may be supplied to show that at the time of the deposit, or of the subsequent advance, it was stipulated that the security should cover future advances as well as the existing debt; and, in such a case, it will be a good security for the future advances. (See *Edge* v. *Worthington.*) And even if there is a memorandum of deposit which is silent on the point as to whether future advances are to be included, parol evidence is admissible here, too, to show that there was an intention to that effect, and on this being shown the security will extend to them.

An equitable mortgagee's proper remedy is foreclosure;

Other questions have arisen as to equitable mortgages, and *inter alia* the question, what is the proper remedy of an equitable mortgagee? Is he to have recourse to sale alone to obtain his money, or may he have recourse to foreclosure? It has been decided that his proper remedy is foreclosure. (*James* v. *James; York Banking Co.* v. *Artley; Backhouse* v. *Charlton.*)

but he may, instead of a

But, as we have seen, under the 25th section of the Convey-

ancing Act, 1881, he may now, in the foreclosure action, ask for a sale, even though there is no memorandum of deposit. (*Oldham* v. *Stringer*.) But the court need not order an immediate sale. (*Green* v. *Briggs*.)

foreclosure, claim a sale.

The depositee may at any time call for a formal mortgage, since the deposit is evidence of an agreement to execute such a mortgage. (*Parker* v. *Housefield*.)

An equitable mortgagee, however, if his mortgage is by deed, may sell the property, under sect. 19 of the Conveyancing Act, but he has no power to convey the legal estate to a purchaser under sect. 21. He can only convey the equitable estate. (*Re Howe and Hodson's Contracts*.) He can also, of course, sue for money lent; and he can transfer his security, and if the mortgagor has expressly agreed to execute a legal mortgage he can appoint a receiver of the property. (*Edgell* v. *Wilson*.) But he has not the important right of a legal mortgagee to himself take possession and receive the rents and profits of the property, nor can he sell and convey the whole legal fee to a purchaser free from the equity of redemption; and not only on account of the weak character of his remedies, but also on account of the risks the mortgagee runs of being postponed to others interested in the estate, having an equity superior to his own, or equal to his own, and also having the legal estate, an equitable mortgage is at all times regarded as an undesirable security; at the same time it is a common form of security adopted by bankers to secure money lent to their customers.

And if his memorandum is by deed, he can himself sell, &c.

He can also sue for money lent,

and can transfer,

but cannot take possession,

and generally is in a far inferior position to a legal mortgagee.

Stamps.

We shall consider the stamps on mortgages at the close of the subject. (See *post*, p. 289.)

Legal Charges.

Unless you elect to be paid for the actual work you do in connection with a mortgage, and this election must be made before you take up the business, your remuneration, whether you act for mortgagor or mortgagee, or for both, will depend on the amount of the mortgage money, and will vary with

Remuneration depends on amount of loan,

though not always.

that amount, as you will see by reference to the scale of charges given in Part I. of Schedule I. of the Solicitors' Remuneration Order, and which you will find set out, Part VIII., *post.* The scale charges, however, are only applicable to mortgages of freehold, copyhold, or leasehold property, and in other cases, *e. g.*, mortgage of a life policy, your remuneration will be regulated by the amount of work done, that is, by the system of charging which prevailed prior to the Solicitors' Remuneration Order, 1882, as altered by Schedule II. of that Order. (See Part VIII., *post.*)

Remuneration for negotiating a loan.

If, acting for the mortgagee, you were instrumental in negotiating the loan, you will be entitled to charge the negotiation fee allowed by the scale of charges already referred to. If, acting for an intending borrower, you succeed in discovering some one willing to advance the money, and that some one is not your own client, you are not entitled to any negotiation fee, though if the facts show you acted as a "scrivener" in the matter, and not as solicitor, you will be entitled to charge a commission. (*Aichison* v. *Gradwell.*)

Remuneration for further charges.

The scale fees do not apply to a further charge where the title was prior to the mortgage itself investigated, but the charges are regulated by Schedule II. of the Order of 1882; that is, you will be paid for the actual work done.

No remuneration to solicitor mortgagee.

By way of conclusion, we must warn you that when you take a mortgage from your own client you cannot charge him any costs for the preparation of the deed, &c. You are only entitled to charge him costs out of pocket, unless you make a clear contract with him that you are to charge him the usual costs—the same costs which he would have to pay were the mortgage made not in your favour, but in favour of some client of yours. (*Re Roberts; Field* v. *Hopkins*, and *Ex parte Lickorish.*) If, however, you are a member of a firm, your partners can investigate the title and prepare the mortgage, and if not able to recover the full charges, are at least entitled to look not only to the mortgagor, but also to the mortgaged property for their share of the costs. (See *Fisher* v. *Doody; Hibbert* v. *Lloyd*, and *Re Rollit and Sons.*)

V. Transfers of Mortgages.

The desirability of the Mortgagor's Concurrence in the Transfer.

Mortgagor's concurrence to a transfer not necessary, but advisable—

On a transfer of a mortgage the question may arise, whether the mortgagor is to join in the transfer. His concurrence is not, of course, absolutely necessary, for the mortgagee has full power to assign the mortgage debt and interest and the security for the same to the transferee. But it is advisable for the mortgagor to join in every case, for the following reasons:—In the first place, his joining amounts to an admission of the state of account between the mortgagee and himself; and then it shuts out, as between him, and the transferee, any undisclosed equities which may exist between the mortgagor and the mortgagee. Thus, if the mortgagor does not join, and a part of the mortgage money has been paid off, the transferee could only compel payment from the mortgagor of what remained owing, as he takes subject to the state of the accounts. If, however, the original mortgage money had never been advanced, but it purported to have been by the terms of the mortgage deed, which contained a proper receipt therefor, and was duly executed by the mortgagor, the transferee of the legal estate could compel the mortgagor to pay the money apparently advanced to him by the terms of the mortgage deed. (See hereon *Bickerton* v. *Walker* and *French* v. *Hope*, overruling *Clark* v. *Parker*.) And further, it is the best evidence that notice of the assignment has reached the debtor, and prevents any doubts arising as to the rights of the transferee to exercise the mortgagee's powers. (See *Bodd* v. *Petrie*.) And, lastly, as it is the practice for the mortgagor when he joins to give a fresh covenant to pay the debt, the transferee gets the advantage of a direct covenant for its payment. It will not, however, be possible in all cases to obtain the mortgagor's concurrence; and in some cases where he is willing to join, he may not be able, as is generally done when he joins, to create a new proviso for redemption, by reason of his having dealt with the old equity of redemption in some way. Thus, then, a transfer of mortgage takes three forms according to the three cases:—(a) Where the mortgagor is not a party; (b) where he is a party, and has not incumbered the

(i) to obtain admission of accounts;

(ii) to effect notice;

(iii) to obtain fresh covenant.

Transfer may take one of three forms—

equity of redemption; (c) where he is a party, but has incumbered the equity of redemption.

(a) *Transfer to which the Mortgagor is not a Party.*

(1) When the mortgagor does not join.

Where the mortgagor does not join, the mortgagee will assign the mortgage debt, and the interest thenceforth to become due on the same, and the benefit of the securities therefor. A power of attorney is now rendered unnecessary by sect. 25 of the Judicature Act, 1873, by which legal choses in action are made assignable, so that the assignee can sue in his own name. (See *Tunnard* v. *The Dringon Bay Railway Co.*; see also *Western Wagon Property Co.* v. *West*, in which it was held that this enactment does not apply so as to enable a mortgagor to assign the benefit of a covenant in the mortgage deed by a mortgagee to make further advances.) The mortgagee next transfers the mortgaged property to the transferee, "subject to such right or equity of redemption as is subsisting in the premises by virtue of the mortgaged deed, on payment to the transferee, his executors, administrators, and assigns, of the money secured." If the mortgagee transfers expressly "as mortgagee," there will be implied by the Conveyancing Act, 1881, s. 7, a covenant on his part that he has not incumbered, and this is all the transferee is entitled to.

In such a case mortgagee conveys "as mortgagee."

Need not assign the power.

The powers of sale and other remedies of the mortgagee need not be expressly transferred, for if they are express ones, they will pass without mention to the transferee, as an assign of the mortgagee; and if they are implied ones, given to the mortgagee by the Conveyancing Act, 1881, they will be exercisable by the transferee as a "mortgagee" under that act. It is, however, the practice to mention them by adding to the assignment of the debt such words as "with the benefit of the power of sale, and all other powers, &c., given by the mortgage for the recovering, &c., of the mortgage debt."

but usually done in practice.

(b) *Where the Mortgagee is a Party, and has not Incumbered the Equity of Redemption.*

(2) When mortgagor joins, not having incumbered the equity of redemption.

In this case, the mortgagee, as before, assigns the mortgage debt, but merely for the purpose of showing that the mortgage

debt is intended to be kept alive for the benefit of the transferee. As to the transfer of the mortgaged property, the mortgagee conveys, at the request of the mortgagor, and as mortgagee, and the mortgagor, as beneficial owner, conveys and confirms, and the habendum is made so as to discharge the property from the old equity of redemption, and to subject it to a new one on payment of the money to the transferee. The mortgagee will covenant that he has not incumbered, and the mortgagor will give new covenants for title, and for the payment of the debt, and also, where the Conveyancing Act is not relied on, new powers of sale, &c.

Mortgagee assigns the debt.

(c) *Where the Mortgagor is a Party, and has incumbered the Equity of Redemption.*

In this case the debt is assigned by the mortgagee to the transferee as before, and the benefit of the power of sale, &c.; but in the conveyance of the property, as neither the mortgagee nor the mortgagor can do anything to alter the equities subsequent incumbrancers have acquired against the land, a new equity of redemption cannot be created, but the habendum is made, as in the first case, "subject to such equity of redemption as the premises are subject to by virtue of" the mortgage deed. The mortgagee covenants that he has not incumbered, which covenant is implied if he conveys "as mortgagee;" but the mortgagor gives no new covenants or power of sale, as these would not be of any use, seeing that he has incumbered the equity of redemption.

(3) When mortgagor is party, having incumbered the equity: Mortgagee assigns debt and power of sale.

Transfer of Mortgages of Copyholds.

When the property is copyhold, the form of the transfer will vary according to the way in which the mortgage has been effected. If the mortgage has been made by a mere covenant to surrender, not followed by the usual conditional surrender, the mortgagee assigns his equitable interest in the premises to the transferee, and the benefit of the same, with power to sue in his name, and the habendum will be made to the transferee, his heirs and assigns, subject to the subsisting equity of redemption, on payment of the money secured to the transferee. When

Form of transfer of copyhold mortgages depends on circumstances—

(1) When there was only a covenant to surrender.

(2) When

there was a conditional surrender.

there has been a conditional surrender, satisfaction of the old surrender should be entered up on the court rolls, and a new conditional surrender made by the mortgagor to the use of the transferee; but when the mortgagor does not join, or has incumbered the equity of redemption, it will be necessary for the mortgagee to be admitted, and then to surrender to the use of the transferee, subject to the equity of redemption then subsisting. Sometimes, to avoid the expense of admittance and the fines due thereon, the transferee will not insist on it, but will be satisfied by a covenant by the mortgagee that he will surrender if required. When the mortgagee has been admitted on the original mortgage, he will of course have to surrender to the use of the transferee, subject, as in the last case, to the existing equity of redemption.

(3) When the mortgagee has been admitted.

Parties to the Transfer after Death of the Mortgagee.

On death of mortgagee—

When the mortgagee is dead, who is the person to make the transfer?

(1) Before Aug. 7th, 1874, the heir or devisee must transfer;

The answer to this question depends on the date of the death of the mortgagee. If he died before August 7th, 1874, the property mortgaged, whether of freehold or copyhold tenure, would descend to his heir or pass under his will to his devisee, who would be the person to execute a conveyance of the premises to the transferee. But by the Vendor and Purchaser Act, 1874, it was enacted that the legal personal representative of a mortgagee of a freehold estate or a copyhold estate to which the mortgagee had been admitted *might*, on payment of all sums secured by the mortgage, convey or surrender the mortgaged estate. This enactment did not, however, as you will perceive, take away the power of re-conveying from the heir or devisee, but merely gave the power of doing so to certain other persons as well as to him. And it was held, in the construction of this act, that it only applied to the case of a re-conveyance, and did not extend to the case of a transfer of the mortgage to some third person. (*Re Spradbury's Mortgage.*) Nor did it extend to enable the personal representatives to convey to a purchaser who bought under an exercise of the power of sale. (*Re White's Trusts.*) Now, however, if the mortgagee dies after

(2) Between 7th August, 1874, and 31st December, 1881, either the legal personal representative or the heir or devisee might transfer;

(3) Since 31st Dec. 1881,

1881, the 30th section of the Conveyancing Act, 1881 (subject to sect. 45 of the Copyhold Act, 1887, hereinafter mentioned), applies, and by virtue of that section a mortgaged estate, on the death of any person in whom it is vested solely, will on his death, notwithstanding any testamentary disposition, devolve on and become vested in his personal representatives like a chattel real, and they will then be the persons to execute the transfer.

the legal personal representative of freeholds must transfer.

This provision was held to apply to copyholds (*Re Hughes*), but now, by the 45th section of the Copyhold Act, 1887, which came into operation on the 16th September, 1887, it no longer applies to lands of customary tenure, and consequently the heir or devisee, on the death of a mortgagee of copyholds, is once more the necessary party to transfer, and it has been held in *Re Mill's Trusts* that the provisions of this section of the Act of 1887 are so far retrospective that, although the mortgagee died after 31st December, 1881, and before the 16th September, 1887, so that the legal estate had vested in his legal personal representative under sect. 30 of the Conveyancing Act, 1881, yet if the property had not on the latter day been conveyed, the legal estate, by the Act of 1887, shifted from the personal representative to the real representative, making him the necessary party to transfer the mortgaged property.

Provision of sect. 45 of the Copyhold Act, 1887.

Three forms of a transfer of a mortgage are given in the Schedule to the Conveyancing Act, 1881, but they are only applicable to a case where the mortgage has been expressed to be made "by way of statutory mortgage," and if used in other cases would appear to leave the legal estate outstanding in the mortgagee.

Statutory transfers.

The forms given are applicable in the three several cases :—

(a) Where the mortgagor does not join ;

(b) Where the mortgagor joins and covenants with the transferee for payment of principal and interest ;

(c) Where the mortgagor and mortgagee both convey, and fresh covenants for payment and title are entered into ; this latter form being really a transfer combined with a fresh mortgage to the transferee.

Three forms thereof.

The effect of a statutory transfer (in whichever form it is made), as stated in the section, is to vest in the transferee the

The effect thereof.

right to demand, recover, and give receipts for the mortgage money and interest, and the benefit of the covenants in the mortgage, and the right to exercise all the mortgagee's powers; and all the mortgagee's estate and interest, subject to redemption by the mortgagor, vest in the transferee, still subject, of course, to redemption. If the transfer is made in the second form, a new covenant for repayment of the mortgage money and interest by the mortgagor to the transferee is implied; and, if made in the third form, it is treated not only as a transfer, but as a new statutory mortgage, and all the preceding provisions relating to statutory mortgages apply to it, nor is such a transfer liable to any increased stamp duty for being in effect a new mortgage. (See 44 & 45 Vict. c. 41, s. 27, and see sect. 28 also as to covenants implied in such transfer.)

The following are the statutory forms given for the transfer of statutory mortgages in Part II. of Schedule III. of the Conveyancing Act, 1881.

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [*&c.*] of the one part and *T.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [*&c.*] of the first part *B.* of [*&c.*] of the second part and *C.* of [*&c.*] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the

concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [*&c.*] of the 1st part *B.* of [*&c.*] of the 2nd part and *C.* of [*&c.*] of the 3rd part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [*&c.*] WHEREAS the principal sum of £ only remains due in respect of the said mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid* *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of† the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness &c.

[*Or, in case of further advance, after* aforesaid *at* insert* and also in consideration of the further sum of £ now paid by *C.* to *B.* of which sum *B.* hereby acknowledges the receipt, *and after* of *at*† *insert* the sums of £ and £ making together]

*** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

Legal Charges.

The charges which you are entitled as solicitor to make in connection with the transfer of mortgages if you were concerned as solicitor with the original mortgage or with any previous transfer in which the title was investigated depend on the work done, and are regulated by Schedule II. of the Solicitors' Remuneration Order, and not by the scale given in Schedule I. In other cases the scale charges allowed for mortgages are applicable to transfers. (See Rule 10 to Schedule I. of the Solicitors' Remuneration Order, 1881, *post*, Part VIII.)

VI. Re-conveyance of Mortgages.

Re-conveyance absolutely necessary in the case of a legal mortgage,

When the money has been paid off, the equitable interest of the mortgagee ceases, but the legal estate will have to be re-conveyed by a formal deed before it can revest in the mortgagor. This re-conveyance is not necessary where the mortgage is only an equitable one, so that on the payment off of a second mortgage, for instance, the mortgagee, not having the legal estate of the premises in him, cannot be called on to re-convey it. The same will be the case when the mortgage has been made by a deposit of title deeds. In these cases a receipt for the mortgage money and interest is sufficient to clear the property from the charge of the debt. But even where the legal estate is in the mortgagee, there are cases in which no formal re-conveyance of it is necessary. For example, the Building Societies Act, 1874, provides that a receipt for the mortgage money indorsed on or annexed to the mortgage deed, shall vacate the security and revest the estate in the person for the time being entitled to the equity of redemption without the necessity of any re-conveyance. (Sect. 142; and see *Fourth City Benefit Building Society* v. *Williams*.) And a somewhat similar provision is made by the Friendly Societies Act, 1875, s. 16 (7). Further, although no re-conveyance has in fact been made, the presumption that one has been made will arise after the lapse of a certain amount of time, if the legal estate has meanwhile been dealt with by the mortgagor as if it had been revested in him. Lastly, if the mortgage was for a long term of years, no re-assignment is strictly necessary on repayment of the mortgage money, since by 8 & 9 Vict. c. 112 directly a long term of years becomes satisfied (*i.e.*, directly the purpose for which it was created is fulfilled) the term ceases, and so in this case the receipt for the mortgage money would suffice, since such receipt shows that the term is satisfied and at an end.

(i) but not in a mortgage to a building or friendly society;

(ii) after great lapse of time;

(iii) mortgage for long term of years.

Form of re-conveyance—(1) of freeholds;

A re-conveyance generally recites the mortgage deed and the state of the debt, and then re-conveys the estate to the mortgagor freed from all charges under the mortgage deed. As to who is the party to make the re-conveyance when the mortgagee is dead, this depends on the same circumstances as the question, who is

to execute a transfer of a mortgage when the mortgagee is dead? (See *ante*, pp. 280, 281.)

When the subject of the mortgage is copyhold land, and there has been merely a covenant to surrender, it is usual to release the debt by deed, though a mere receipt for the mortgage money and interest would, in equity at least, be quite sufficient. If there has been a conditional surrender, the mortgagee gives a warrant to enter up satisfaction on the court rolls, and when this has been done the land will be discharged from the debt. If the mortgagee has been actually admitted he will have to surrender again to the use of the mortgagor, who will be re-admitted as tenant on the court rolls. (2) of copyholds.

The following is a copy of the short form of statutory re-conveyance as set out in Part III. of the Third Schedule to the Conveyancing Act, 1881, which can be used in re-conveying mortgaged property when the mortgage itself was drawn as a statutory mortgage:— Statutory form.

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness &c.

*** *Variations to be made, as required, in case of the deed being made by indorsement, or in respect of any other thing.*

Legal Charges.

The charges to which you are entitled, as a solicitor concerned in the matter of a re-conveyance of a mortgage, depend on the work done, and are regulated by Schedule II. of the Solicitors' Remuneration Order, and are not governed by a scale charge depending on the amount of the mortgage money. Remuneration for re-conveyance.

VII. Some Miscellaneous Matters.

Powers and Duties of Mortgagors and Mortgagees in Possession.

The remedies of a mortgagee.

We have incidentally seen that a mortgagee has many remedies to recover his money. Thus we have seen he can sue on his covenant or bond; he can foreclose; he can sell under his power of sale; he can obtain the rents and profits of the property by appointing a receiver; he can transfer his security, and this not only absolutely but by way of mortgage, that is to say, he can borrow money on the security by making what is called a sub-mortgage; and these remedies he can pursue concurrently or consecutively, subject, however, to this—that if he has foreclosed, and then he sues on the covenant, he opens the foreclosure and gives the mortgagor another opportunity of redeeming the estate; and if after foreclosure he has sold the property as owner thereof, the court will not allow him to sue on the covenant, as he has put it out of the power of the mortgagor to redeem. (*Lockhart* v. *Hardy*; *Palmer* v. *Hendrie*.)

Should the mortgagee pursue his remedy by way of sale, that is, sell as "mortgagee," as he usually does, and the estate does not realize sufficient to pay principal, interest and costs, he can sue on the covenant for the deficiency, in spite of the mortgagor having no longer a chance of redeeming the estate. (*Rudge* v. *Richens*.)

In addition to these remedies a mortgagee (not being a mere equitable mortgagee by deposit or memorandum) may take possession—his common law remedy, of which he does not often take advantage, but he allows the mortgagor to remain in possession in most cases until by sale or action he proceeds to obtain repayment of what is owing to him. We propose in this place to say a few words on the duties and powers of a mortgagor and mortgagee in possession.

Powers and duties of—(i) mortgagor in possession;

Independently of the powers and duties conferred and imposed by the mortgage deed, there are certain powers which the mortgagor or the mortgagee may exercise while in possession; and, similarly, there are certain duties which the rules of equity compel them to observe. A mortgagor, while he is still in possession, is to a great extent treated in equity as still being

the owner of the land; and may, accordingly, exercise many acts of ownership. He cannot make a lease of the property which will be binding upon the mortgagee except by virtue of an express power, or under the provisions of the Conveyancing Act, 1881; but he may, as a rule, cut timber on the estate, unless the result would be materially to diminish the value of the security. (See *King* v. *Smith*.) He may, also, now (although he could not do so formerly) bring actions in his own name for the recovery of the rents and profits of the property, and may sue for trespasses done to the land, &c. under sect. 25 of the Judicature Act, 1873. He may also distrain for rent. (*Reece* v. *Straysberg*.) He may also cut and remove growing crops, so long as he has received no notice from the mortgagee demanding possession; but such a demand will put an end to this right; and it is not necessary for the mortgagee to take proceedings in ejectment, as the mere demand for possession is sufficient to determine his possession, and to make any further continuance in it wrongful. (See *Bagnall* v. *Villier*.)

(a) as to leasing;

(b) as to suing;

(c) as to crops.

A mortgagor remaining in possession after the money has, by the terms of the mortgage deed, become due, is the tenant first at sufferance of the mortgagee, and then remaining in possession with the consent of the mortgagee he becomes his tenant at will, but without liability to pay any rent.

Mortgagor in possession tenant of mortgagee.

The mortgagee has the right to take possession at any time after the time appointed for payment of the debt; and, having taken possession, is entitled to receive the rents and profits, and apply them towards the payment of his debt. But he will have to account for all the rents, &c., he receives. In the management of the property he is bound to act in the same way as a prudent man would act if the property were his own. Thus he will be responsible for any acts of wilful injury or gross negligence, *e.g.*, pulling down buildings without sufficient reason. But he may pull down houses and buildings which are ruinous, and build others on their site (*Hardy* v. *Rees*); and, as a rule, he will be allowed all sums expended by him in necessary repairs. (*Sandon* v. *Hooper*.) But if these repairs are of a very substantial and permanent nature, and involve considerable expense, it seems he will have to show the necessity of executing them before he is entitled to recover what he has expended.

(ii) mortgagee in possession:

(a) as to buildings;

(b) as to repairs;

(*Tipton Green Colliery Co.* v. *Tipton Moat Colliery Co.*) Otherwise he may, but is not, however, bound to, lay out money on the estate, or expend money in rebuilding. (See *Godfrey* v. *Watson*, and *Moore* v. *Painter*.) He cannot charge for improvements effected in the property unless made with the mortgagor's consent express or implied, for he must not make it more expensive for the mortgagor to redeem than necessary.

(c) as to improvements;

(d) as to leasing:

As we have seen, a mortgagee in possession can now make a lease which will bind the mortgagor after redemption. (See *ante*, p. 261; and 44 & 45 Vict. c. 41, s. 18.)

It has been held that a mortgagee who leases with restrictions on the tenant must account for such additional rent as they would have made if the premises had been let without restrictions. (*White* v. *City of London Brewery Co.*)

(e) as to opening mines;

A mortgagee in possession should be careful not to engage in any speculative experiments with the land (see *Hughes* v. *Williams*); and it has been held that he must not open mines, unless the security proves deficient. (*Millett* v. *Davey*.)

(f) as to accounting with and without annual rests;

Sometimes the rents received by the mortgagee when in possession are more than sufficient to keep down the interest on the mortgage debt. A question sometimes arises in such cases whether the mortgagee, in furnishing his accounts of the rents received, is to account, as it is called, "with annual rests," or whether he will not be laid under the necessity of doing so. He is said to account with annual rests when the surplus rents are applied in payment of the principal, and each year the principal so reduced is considered as the money due on the mortgage, so that interest becomes payable not on the original amount advanced, but on the amount of principal as actually remaining due after the reduction effected by the receipt of the surplus rents. Whether or not he will be directed to account with annual rests will depend on the circumstances under which he took possession. If he did so arbitrarily, when, for instance, there was no interest in arrear, and there was no other ground for taking possession, he will generally have to account with annual rests; for the very fact of his entering when there is no interest in arrear shows his intention to get payment of his money out of the rents and profits, and so receive his money, as it is said, "in driblets"; whereas if he is driven to take posses-

sion because the interest is in arrear, or for other good reasons, he does so for his own protection merely, and no such intention can be implied in that case from his act; so that the interest will be still payable on the amount of the money lent, and not on the amount as it actually stands from time to time after reduction by the application of the surplus rents. (*Nelson* v. *Booth*.) This rule would not seem to apply to the case of a mortgage of leaseholds, if at least there are other circumstances which justify the taking of possession, as where he enters to prevent a forfeiture for nonpayment of ground rent or non-insurance. (*Patch* v. *Wild*.)

The mortgagee in possession is always entitled (whether he has to account with annual rests or not), where there are two rates of interest properly reserved in the mortgage deed (see *ante*, p. 242), to charge in the accounts the higher rate of interest. (*Bright* v. *Campbell*.)

(g) as to surplus rents;

When a mortgagee properly takes possession he retains the surplus rents until such time as the mortgagor redeems the estate, when he must account for them. If in course of time the surplus rents are equal to the principal money owing to him, from that time he becomes responsible to the mortgagor to account to him with interest at compound rate. (*Ashworth* v. *Lord*.)

(h) as to paying rent.

A mortgagee who is in possession, either by himself or his servant, must pay an occupation rent; unless the property from its ruinous state, or for any other reason, is incapable of making any return. (See *Marshall* v. *Cave*.)

How rent is reckoned.

Occupation rent to be paid by the mortgagee is reckoned according to the value of the premises when he took possession, and not to their value after he has improved them. (*Bright* v. *Campbell*; *Whitworth* v. *Lord*.)

Stamps on Mortgages, Transfers, and Re-conveyances.

A few words on the subject of stamping mortgages may be useful to you. This subject is now governed by the Stamp Act, 1891, to which you will in any case of intricacy have to turn.

Time for stamping.

The time allowed for stamping mortgages (including further charges, second mortgages, memoranda evidencing equitable

Amount of stamp duty.

mortgages, transfers, and re-conveyances) is thirty days after the execution of the instrument of mortgage. The amount of stamp duty on legal mortgages (including second and subsequent mortgages and equitable mortgages, where the memorandum is under seal, but not including transfers of mortgages or equitable mortgages, where the memorandum is not under seal, or re-conveyances) is at the rate of 2*s.* 6*d.* for every 100*l.* secured, and this even though the value of the property be less than the amount advanced. The stamp duty on equitable mortgages where the memorandum is not under seal is at the rate of 1*s.* for every 100*l.* The stamp duty on transfers is at the rate of 6*d.* for every 100*l.*; the duty is charged on the *amount transferred*, and not on the amount paid by the transferee to the transferor, and interest *in arrear* (but not interest not accrued due at the date of the transfer) must be included in the amount upon which transfer duty is paid.

The stamp duty on re-conveyances is also an *ad valorem* duty of 6*d.* per cent.

Where copyholds situate in different manors are mortgaged, and there are several warrants to vacate, only one warrant is chargeable with an *ad valorem* duty.

Exemption from duty.

Mortgages by members to building societies which are certified under 3 & 4 Will. 4, c. 32, and have not obtained a certificate of incorporation under the Building Societies Act, 1874, are exempt from stamp duty, provided the amount does not exceed 500*l.*; but all other building society mortgages must be stamped in the same way as other mortgages, the general exemption conferred by 6 & 7 Will. 4, c. 32, having been taken away. (See sect. 89 of the Stamp Act, 1891.)

Part III.—BILLS OF SALE.

In superintending the preparation and completion of a bill of sale of personal chattels (whether it be an absolute one or one by way of mortgage), it will be absolutely necessary for you to have at your fingers' ends the provisions of the Bills of Sale Acts, 1878 and 1882, and to have an intimate acquaintance with the most important at least of the numerous cases which have been decided in the interpretation of the various sections of these two statutes. Prior to the 10th of June, 1854, the validity of a bill of sale was not dependent on any statutory enactment; but on that date the Bills of Sale Act, 1854, came into operation, and, as one of its main provisions, required the registration of all bills of sale made after that date. (17 & 18 Vict. c. 36.) This statute was supplemented by the Act of 1866 (29 & 30 Vict. c. 96), which required the re-registration of a bill of sale every five years. But both these statutes are now repealed, and the law on the subject is at the present time contained in the two Acts of 1878 and 1882 (as slightly amended by the Bills of Sale Acts, 1890 and 1891), and is not in any way affected by the Sale of Goods Acts, 1893.

Formerly no statutory provisions as to bills of sale.

Acts of 1854 and 1866.

Acts of 1878, 1882, 1890, and 1891.

As the 1882 Act is to be construed as far as possible as one with the 1878 Act, it will be the most convenient plan to consider the provisions of the two statutes together, and this we propose to do under the following several heads :—

Divisions of subject.

I. What is a bill of sale within the acts?
II. What are personal chattels within the acts?
III. The requisites of the Act of 1878 as to the execution and attestation of the bill of sale.
IV. The requisites of the Act of 1882 as to the contents, execution and attestation of bills of sale.

V. The provisions of the acts as to the consideration, registration and re-registration of a bill of sale.

VI. What amounts to "apparent possession" under the Act of 1878?

VII. How far the order and disposition of the Bankruptcy Act is affected by registration.

VIII. Some miscellaneous matters.

I. What is a Bill of Sale within the Acts?

What instruments are bills of sale?

A bill of sale which will come within the provisions of the acts includes—

Bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipts attached thereto, or receipts for the purchase-money of goods, and other assurances of personal chattels. (See *Re Hood.*)

Powers of attorney, authorities or licences to take possession of personal chattels as security for any debt. (See *Re Townsend*, *Ex parte Parsons;* and *Grigg* v. *National Guardian Assurance Co.*)

Any agreement, whether intended or not to be followed by the execution of any other instrument, by which a right in equity to any personal chattels, or to any charge or security thereon, shall be conferred.

Every attornment, instrument or agreement whereby a power of distress is given, or agreed to be given, by any person to any other person by way of security for any present, future or contingent debt or advance, and whereby any rent is reserved or made payable as a mode for providing for the payment of interest or otherwise for the purpose of such security only. (See *Pulbrook* v. *Ashby*, and *Stevens* v. *Marston.*) This includes a mortgage deed of lands containing the usual attornment clause. (*Ex parte Kennedy*, *Re Willis;* and see *Green* v. *Marsh.*)

Cases on the construction of the definition of a bill of sale.

In the construction of the above catalogue, it has been held that the form of the instrument is immaterial, so long as the intention to transfer or create a security, by passing the imme-

diate property, be shown (*Branton* v. *Griffiths*); that it is not necessary that the bill of sale should be contained in one instrument (*Ex parte Odell*); that the instrument will not be a bill of sale within the act unless it be given by the person who is the owner of the property comprised in it; so that if furniture is sold on the hire system, and in the hiring instrument it is stipulated that the property shall not pass to the purchaser till he has paid all the instalments, such instrument will not be a bill of sale, so as to require registration (*Crawcour* v. *Salter;* and see *Ex parte Orme*, *Ex parte Rawlings*, *Re Davis*); that "inventories of goods with receipts attached" will include an inventory and receipt on an absolute sale under a writ of execution by the sheriff. (*Chapman* v. *Knight.*) In all cases where the receipt is used as the medium of transfer or record of transaction, and is not merely an acknowledgment of payment, it is a bill of sale. *Secus*, where only used as evidence of a transfer effected in some other way. (See *Re Hood; Marsden* v. *Meadows; Fox* v. *Bennett; Grace* v. *Card*, and *Wilkinson* v. *Gerard Frères.*) But if there is a change in the possession of goods, and the agreement by which such change is effected cannot be proved apart from a written instrument, that writing is a bill of sale. (*Mills* v. *Charlesworth*, and *Re Hood.*) In *The North Central Waggon Co.* v. *The M. S. & L. Rail. Co.*, it was held that an invoice and receipt taken in connection with a hiring agreement, which was perfect without going to the writings, did not constitute an assurance of the chattels, and, indeed, was not a bill of sale requiring registration. As to specious hiring agreements, however, recent decisions have established that when that which purports to be a hiring and purchase agreement is in reality a bill of sale, the agreement must be registered as a bill of sale; and the court will always in these cases go behind the form of the document and inquire what is the real nature of the transaction. (See *Re Watson; Madell* v. *Thomas & Co.;* and *Beckett* v. *Tower Assets Co.*) Again, a "licence" within the act means a licence to take possession of property as a security for a debt (*Ex parte Newitt, Re Garraud*); but not a licence to take possession of it in discharge of a debt.

An agreement in a lease allowing a landlord to distrain on

goods for money due for goods supplied, or for premiums on policies of assurance paid by the landlord, is a bill of sale requiring registration (*Pulbrook* v. *Ashby*; *Stevens* v. *Marston*); and so is a mortgage of lands with an attornment clause. (*Ex parte Kennedy, Re Willis.*)

What instruments are *not* bills of sale, (a) within the Act of 1878;

The Bills of Sale Act, 1878, expressly provides that the following shall not be deemed bills of sale within the act:—Assignments for the benefit of the creditors of the assignor; marriage settlements; transfers or assignments of any ship; transfers of goods in the ordinary course of business; bills of sale of goods in foreign parts, or at sea; bills of lading; India warrants; warehouse keepers' certificates; warrants or orders for the delivery of goods, or any other documents used in the ordinary course of business, as proof of the possession or control of goods, or authorizing, or purporting to authorize, either by indorsement or delivery, the possessor of such document to transfer or receive goods thereby represented. The words "marriage settlement," however, only include ante-nuptial settlements, settlements made after the marriage, but in pursuance of ante-nuptial agreement (see *Ashton* v. *Blackshaw*); and a memorandum of agreement for a marriage settlement. (*Wenman* v. *Lyon.*) Other post-nuptial settlements of personal chattels are bills of sale within the Act of 1878, and form good examples of *absolute* bills of sale. And by sect. 17 of the Act of 1882, the act is not to apply to debentures issued by any mortgage, loan, or other incorporated company, and secured on the capital stock or effects of the company. (See hereon *Read* v. *Joannon*, and *In re The Standard Manufacturing Co.*, which latter case shows that neither the Act of 1878 nor the Act of 1882 applies to debentures issued by registered companies.) Again, a document accompanying the pledge of goods as a security for money need not be registered to make it valid (*Re Hall, Ex parte Close; Re Cunningham & Co.*); nor need an assignment for value of future property, without the right to take possession (see *Morris* v. *De Flobbel Flipo*); nor need a building contract which provides that all materials brought on the land by the contractor shall become the property of the contractor's employer. (*Reeves* v. *Barlow.*) But see *Church* v. *Gage*, in which it was held that an assignment as a security for a loan of a building agreement, with

(b) within the Act of 1882.

plant and materials on the land, was a bill of sale needing registration as to the plant and materials.

By the Bills of Sale Acts, 1890 and 1891, certain letters of hypothecation, *i. e.*, those creating a security or the like on imported goods prior to their being deposited in a warehouse, &c., or being re-shipped, are excluded from the operation of the Bills of Sale Acts, 1878 and 1882. (c) within either Act.

We may here mention, the Act of 1878 applies to all bills of sale executed after the 31st December, 1878, whether such bills are absolute or subject or not to any trust, whereby the holder has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any personal chattels comprised therein. To what bills of sale the 1878 Act applies.

The Act of 1882 (except in its 7th and 13th sections, which are retrospective, *Ex parte Cotton*) only applies to bills registered on or after November 1st, 1882 (*Eli-Hickson* v. *Darlow*), and only when they are given as security for the payment of money. (*Swift* v. *Pannell.*) Thus, the repeal effected by the 1882 Act of sects. 8 and 20 of the Act of 1878, only applies to bills of sale to secure money, and the sections are still in full force with regard to absolute bills of sale, which must be registered in accordance with sect. 8 of that act. (*Swift* v. *Pannell; Ex parte Izard;* and *Casson* v. *Churchley.*) To what bills of sale the 1882 Act applies.

II. What are Personal Chattels within the Acts?

This question is answered by the 4th section of the Act of 1878. Such chattels will comprise— Personal chattels,

Goods, furniture and other articles capable of complete transfer and delivery, and fixtures and growing crops, if these are separately assigned or charged. (a) within the acts;

But they do not comprise real estate; indeed, if a bill of sale assigns by way of mortgage chattels real as well as chattels personal, the bill, if registered, is void, for it departs from the statutory form. (*Cochrane* v. *Entwistle.*) (b) not within the acts.

Nor do chattels include chattel interests in real estate; fixtures (except trade machinery), when assigned together with a freehold or leasehold interest in the land to which they are affixed; nor even trade machinery which is assigned as part of leasehold premises, and which there is no power to sever and sell apart

from the premises (*Batchelor* v. *Yates*; *Ex parte Lusty, Re Lusty*; and see *Small* v. *National Provincial Bank of London*); growing crops assigned with an interest in the land on which they grow; shares or interests in government stock, funds, or securities, or in the capital or property of any incorporated or joint stock company; choses in action; any trade debts (see *The Official Receiver* v. *Tailby*); stock or produce on any farm or lands which, by virtue of agreement or custom, ought not to be removed from any farm where they are when the bill of sale is made; nor are ships, including barges (*Gapp* v. *Bond*), chattels within the act.

How far fixtures are within the acts,

With regard to fixtures, the act provides that they shall not be deemed to be separately assigned or charged, by reason only that they are assigned by separate words, or that power is given to sever them from the land, so long as some interest in the land is by the same instrument conveyed to the assignee. But fixtures in this sense will not include trade machinery within the act; and an assignment of such machinery will have to be registered, even though assigned—that is, expressly assigned—in connection with some interest in the land to which it is attached. (But see *Batchelor* v. *Yates*.)

and how far trade machinery.

Trade machinery within the act means the machinery used in or attached to any factory or workshop, with the following exceptions:—fixed motive powers (see *Topham* v. *The Greenside Glazed Firebrick Co.*), such as water wheels and steam engines, steam boilers, donkey engines, and other fixed appurtenances to the said motive powers—the fixed power machinery, such as the shafts, wheels, drums, and their fixed appurtenances, which transmit the action of the motive powers to the other machinery, fixed and loose—pipes for steam, gas, and water in the factory or workshop. A factory or workshop means any premises on which any manual labour is exercised by way of trade, or for the purposes of gain, in or incidental to the making of any article, or part of an article, to the altering or repairing, ornamenting or finishing any article, or to the adapting for sale of any article. The excepted machinery, be it noted, is to be deemed not merely "not trade machinery," but "not personal chattels," and from this it follows that an assignment of such excepted machinery is not under any circumstances a bill of sale.

How far after-acquired chattels can be covered by bill of sale.

It will be convenient here to consider how far a bill of sale can be framed so as to affect after-acquired chattels. To state the matter briefly, it is now useless (subject to certain exceptions; see *post*, pp. 298, 299) to make a mortgage of after-acquired chattels by bill of sale; for by the Act of 1882 the bill has to have annexed to it a schedule containing an inventory of the property comprised in the bill, and it will be void (except as against the grantor) as to chattels not so described; and, again, such a bill will be void (except as against the grantor) in respect of chattels of which he (the grantor) was not the true owner at the time of execution. Although the act enacts in effect that as against the grantor such a bill of sale of after-acquired chattels is good, yet it has been held that, owing to sect. 9 of the act requiring a schedule of the goods, the bill will be void even against the grantor if it contain after-acquired chattels, for it is impossible—at least in most cases—for such goods to be described in the schedule in accordance with the act. (*Thomas* v. *Kelly;* and see *Seed* v. *Bradley*.) In spite of registration, then, the after-acquired chattels would, if they were in the possession of the grantor at the time of an execution or on his bankruptcy, pass to the execution creditor or the trustee, and the mortgagee would derive no protection from his security. The provisions of the Act of 1882 only applying to bills of sale to secure money (*Swift* v. *Pannell*), an absolute bill of sale of after-acquired chattels can still be given, and a few words as to the assignment of after-acquired chattels will be useful; and in spite of the provision in the Act of 1882, that a bill of sale of goods to secure money, of which the grantor is not the true owner at the time, is void, except as against the grantor, it has been recently held that a second bill of sale may be given, and it will pass the right to the goods to the grantee subject only to the rights of the holder of the first bill of sale. (*Thomas* v. *Searles*.)

Rule at common law as to future-acquired property.

At common law a man could not grant property not yet acquired by him, but which he merely expected to acquire. But in equity it was held that a man might assign property in which he had no interest at the date of the assignment, but which he expected would be his at some future date, provided such property was capable of being identified and was

specific. (*Holroyd* v. *Marshall; Re Coombe, Carter* v. *Coombe.*) For example, it was held in *Lazarus* v. *Andrade*, that future property was sufficiently specific if it was described as "stock-in-trade, goods, chattels, and effects, which shall or may be brought into the said messuage at any time during the continuance of this security, or be appropriated to the use thereof, either in addition to or in substitution for stock-in-trade, &c., now being therein." But where the property was to be brought on to certain premises, or "elsewhere in the kingdom of Great Britain," it was held it was not sufficiently specific. (*Belding* v. *Read.*)

Actual assignment required.

In order effectually to transfer the future property, there must be an actual assignment of it which operates to pass a present interest in it. If the assurance amount to a mere licence to take possession of it or to seize it, it will be necessary for the assignee to take possession of the property when the assignor acquires it before it will vest in him. (See *In re Hockey, Ex parte Hammond, &c.; Congreve* v. *Evetts; Hope* v. *Hayley.*) And again, it must be more than a mere contract to assign. If it is merely a contract of this kind, the result will be that if the intended assignor becomes bankrupt before acquiring the property, and gets his discharge in bankruptcy, having not yet acquired such property, the discharge will free him from the contract, so that when he does acquire the designated goods or chattels, they will not pass to the assignee. (See *Collyer* v. *Isaacs.*)

An assignment of property yet to be acquired is but an equitable assignment.

It should be borne in mind, too, that notwithstanding the Judicature Act, 1873, an assignment of property to be acquired by the assignor at some future date remains an equitable assignment, so that if the assignor, upon acquiring the specified property, transfers it for value to some third person who has no notice of the prior equitable assignment, the first assignee's rights will be defeated, and the third person will have priority, as he has got the legal title. (*Joseph* v. *Lyon; Hallas* v. *Robinson.*) Finally, you should note that there are certain cases in which future property can still be assigned by way of mortgage, in spite of sect. 4 of the Bills of Sale Act, 1882, and the assignment yet be good as against other persons than the grantor. These are the cases of the assignment of growing crops separately assigned or charged, where such crops are

Crops, fixtures and plant can

actually growing at the date of the execution of the bill, and of fixtures separately assigned or charged, plant or trade machinery which have been substituted for fixtures, plant or trade machinery enumerated in the schedule to a bill of sale. (See sect. 6.) And quite recently—where a bill of sale of furniture to secure money contained a covenant by the grantor not to remove the goods except for repair, and to replace any of the goods described in the schedule, if worn out, by other goods of a similar nature—it was held that, in spite of *Kelly* v. *Thomas*, in which the House of Lords seemed to lay down that a bill of sale is void if it includes chattels not described in the schedule, the bill of sale was held good. (*Seed* v. *Bradley*.) still be assigned.

III. The Requisites of the Act of 1878 as to the Execution and Attestation of Bills of Sale.

Having now seen what is meant by the expression "bill of sale" and "chattels," within the two acts, we must proceed to examine what are the requirements of the Act of 1878 as to bills to which it applies, and to which the Act of 1882 does not apply. As we have before pointed out, the Act of 1878 applies to all bills, *whether absolute or not*, executed on or after the 1st January, 1879, and registered before the 1st November, 1882, and also to all bills of sale registered after the latter date, unless they are bills given by way of security for the payment of money. With regard to the bills to which it applies, the Act of 1878 requires them to be duly attested, and to be registered under the act within seven days of the making or giving thereof, and to set forth the consideration for which they are given. The result of not complying with these requirements (which as to absolute bills must still be observed in spite of the Act of 1882, and the repeals effected by that act (*Casson* v. *Churchley; United Telephone Co.* v. *Bassano*)) is that the bill will be void as against all trustees or assignees of the estate of the person whose chattels, or any of them, are comprised in the bill, under the bankruptcy laws or under any assignment for the benefit of the creditors of such person, and also as against all execution creditors. But the bill is only void as against these persons so far as regards Requirements of the 1878 Act.

the property in or right to the possession of any chattels comprised in such bill which at or after the filing of the bankruptcy petition, or the execution of the assignment, or the execution of process, and after the expiration of such seven days, are in the possession or apparent possession of the grantor.

Bill of sale under the 1878 Act must be attested by a solicitor.

We must now turn to the mode prescribed by the Act of 1878 for the execution and attestation of bills of sale, to which the statute applies. Sect. 10 requires the execution to be attested by a solicitor, and that the attestation shall state that before the execution of the bill the effect thereof was explained to the grantor by the attesting solicitor. It has been held that this attestation is only essential in those cases in which the bill has to be followed by registration, to make it valid under the act. Registration is not required to make the bill valid as between the grantor and the grantee, so that it follows that a bill of sale will not be void as against the grantor, even though it has not been attested by a solicitor; but it will be void in such a case against an execution creditor or trustee in bankruptcy of the grantee. (*Davis* v. *Goodman.*)

How far explanation before execution is required.

Curiously enough, it has been held that though the attestation must contain a statement that the attesting solicitor explained the effect of the bill to the grantor before execution, it is not necessary to the validity of the bill that any such explanation shall in fact have been given to the grantor. (*Ex parte National Bank, Re Haynes.*) And further, it is not necessary that such a statement shall be contained in the affidavit, which, as we shall see hereafter, has to be filed upon the registration of the bill. (*Ex parte Bolland, Re Roper.*)

Attesting solicitor need not be practising nor have certificate.

The attesting witness must be a solicitor; but it is not necessary that he be one practising for himself nor having a certificate. Thus, a managing clerk who has been admitted, but who has not taken out a certificate, can attest a bill. (*Hill* v. *Kirkwood.*) The grantee of the bill, even if he is a solicitor, is disqualified from acting as the attesting witness. (*Seal* v. *Claridge.*) But a solicitor who acts for both parties to the bill (*Vernon* v. *Cook*), or even for the grantee only (*Penwarden* v. *Roberts*), may attest the bill.

Attestation by solicitor still necessary

Notwithstanding the fact that sect. 8 of the Bills of Sale Act, 1878, which requires this attestation by a solicitor, has been

repealed by the Act of 1882, yet the repeal only applies to bills of sale given as a security for money, and consequently absolute bills of sale must still be attested by a solicitor to make them binding as against third parties. (*Swift* v. *Pannell*; *Casson* v. *Church*; *United Telephone Co.* v. *Bassano.*) Thus, if a man settles his furniture on his wife by a post-nuptial settlement, not made in pursuance of ante-nuptial articles, the settlement being a bill of sale of personal chattels within the Act of 1878, and not being given as a security for money, must be executed and attested as the Act of 1878 requires, and if not, though good between the man and his wife, so as to enable the wife to take possession of the goods, yet, if she does not take this out of her husband's apparent possession before his bankruptcy, or execution being levied against him, the goods will belong to the trustee in bankruptcy or execution creditor. Further, if after having made such a settlement upon his wife the husband made an absolute assignment of the goods to someone else, whose bill of sale was properly attested and registered as required by the act, the subsequent assignee would gain priority over the wife (see *Conolly* v. *Steer*, and *Lyons* v. *Tucker*); but as by virtue of the settlement the husband is no longer the "true owner," but only the "apparent" owner, a bill of sale of the chattels made subsequently *to secure money* would be void, and the wife's title would prevail, owing to sect. 5 of the Act of 1882, which makes void (except as against the grantor) a bill of sale to secure money of goods of which at the time the grantor is not the true owner. (*Tuck* v. *Southern Counties Deposit Co.*)

for absolute bills of sale.

IV. The Requisites of the Act of 1882 as to the Contents, Execution, and Attestation of Bills of Sale.

We must now turn to the Act of 1882, and see what its requirements are as to the bills of sale to which it applies, *i.e.*, to bills of sale given as a security for money and registered on or after 1st November, 1882. (*Hickson* v. *Darlow.*) The first of these is contained in sect. 4, which requires every bill to have a schedule containing an inventory of the chattels comprised in

the bill, and the bill will only have effect in respect of the chattels specifically mentioned in such schedule; and if the bill extends to goods not described in the schedule it will be void altogether. (*Thomas* v. *Kelly*, but see *Bradley* v. *Seed*, in which it was held that a bill of sale in which there was a covenant to keep the furniture the subject of the bill in repair, and to replace any articles described in the schedule which might be worn out by others of a similar kind was good, and not void, within the law of *Thomas* v. *Kelly*.) And further, even if the chattels be specifically described in the schedule, the bill will, except as against the grantor, be void as to those of which the grantor is not the true owner at the time of the execution of the bill. (Sect. 5. See *ante*, p. 297.) The effect of this provision is, practically, to prevent the mortgaging by bill of sale of after-acquired property. (But see *Bradley* v. *Seed*, *supra*.) But a man remains the "true owner" of the goods in spite of a previous mortgage of them. (*Thomas* v. *Searles*.) And where one of two partners with the assent of his co-partner mortgaged the partnership goods for a loan for the benefit of the partnership, it was held that he was the true owner to the extent of his share in the partnership goods, but the bill was void as to the goods which belonged to his co-partner. (*Ex parte Barnett*, *Re Tamplin*. And see also *Ex parte Pratt*, *Re Field*; *Tuck* v. *Southern Counties Deposit Bank*, *ante*, p. 301; and *Re Sarl*, *Ex parte Williams*.) This schedule need not contain a detailed description of each article, but it must contain such an inventory as is usual in business; and a mere general description, such as "household goods," is insufficient. (*Roberts* v. *Roberts*; and see *Jones* v. *Roberts*, where the property was described as "my farming stock, comprising four horses," and it was held a sufficient description of two mares, a horse and a pony: see also *Dean* v. *Carpenter*.)

On what events the grantee can seize.

The act next restricts the power of the parties to stipulate at their pleasure upon what events the usual power to seize the goods comprised in the bill shall be exercisable. The parties can only contract that the grantee shall have power to seize the goods for the following causes:—

(1) If the grantor makes default in payment of the money

secured at the time provided for payment, or in the performance of any covenant or agreement contained in the bill and necessary for maintaining the security (see *Hetherington* v. *Groome*, *Bishop* v. *Beale*, and *Clemson* v. *Townsend*, which decide that the money cannot be made repayable on demand, nor a certain time after demand; and see *Re Wood*, *Ex parte Wolfe*);

(2) If the grantor becomes bankrupt (see hereon *Gilroy* v. *Bowie*), or suffers the goods to be distrained for rent, rates, or taxes;

(3) If the grantor *fraudulently* either removes or suffers the goods, or any of them, to be removed from the premises;

(4) If the grantor does not, without reasonable excuse, upon demand in writing by the grantee, produce to him his last receipts for rent, rates, and taxes (but see *Hammond* v. *Hocking*, and *Barr* v. *Kingsford*).

(5) If execution is levied against the grantor.

Grantor may within five days after seizure apply to restrain sale;

Moreover, when the grantee *has* seized, the grantor may, within five days from the seizure, apply to the court, or to a judge in chambers, and such court or judge, if satisfied that by payment of money or otherwise the cause of seizure no longer exists, may restrain the grantee from removing or selling the chattels, or make such other order as may seem just. It has been held that this section is retrospective, and applies to bills of sale as a security for money registered as well before as on and after the 1st November, 1882. (*Ex parte Cotton.*)

chattels cannot be removed for five days.

This section is supplemented by sect. 13, which provides that all chattels seized, or of which possession is taken, after the commencement of the act, under or by virtue of any bill, shall remain on the premises where seized or taken possession of, and shall not be removed or sold until after the expiration of five clear days from the day they were seized or taken. But the grantor can waive this provision, which is for his benefit. (*Lane* v. *Tyler*, and *Tomlinson* v. *Consolidated Loan Co.*)

This section also applies, by express enactment, to bills of sale to secure money registered as well before as on or after 1st November, 1882.

Grantor's

Even after the goods have been removed with a view to their

rights after removal.

sale, the grantor may redeem them on payment of all that is owing for principal, interest, and costs of seizure, but if he merely tenders the principal and interest without the costs of seizure, the grantee is justified in proceeding with the sale, and does not incur responsibility as a trespasser. (*Johnson* v. *Diprose*, 12 L. N. 73.)

As to attestation, registration, and consideration.

The next requirements of the act are that the bill shall (1) be duly attested; (2) shall be registered within seven days of execution, or, if executed out of England, then within seven days after the time in which, in the ordinary course of post, it would arrive in England if posted immediately after execution; and (3) shall truly set forth the consideration. If these requirements are not complied with, the bill will be *absolutely void*, and not good even as against the grantor, as a bill would be under similar circumstances if it fell within the Act of 1878 only. (See *Davis* v. *Goodman*.)

Where the defect in the bill of sale consists of the consideration not being truly set forth, the bill of sale is not mere waste paper as it is when it is not in the statutory form, or not duly executed or attested (*Davies* v. *Rees*); it is merely void as to the chattels comprised in it, and a covenant to repay the money contained in the bill remains good, and can be sued upon. (*Haseltine* v. *Simmons*; and see *Cohen* v. *Higgins*.)

Attestation by one or more witnesses.

Sect. 10 explains what is meant by due execution, and provides that the execution of the bill by the grantor (see *Furnival* v. *Hudson*, where it was held that the grantor may appoint the grantee his attorney to execute the bill of sale) shall be attested by one or more credible witness or witnesses not being a party to the bill. You will observe that attestation by a solicitor, and the explanation by him of the effect of the bill to the grantor, is no longer necessary, except as to those bills which do not fall within this act, but fall within the act of 1878. The bill will be void if the witness signs his name without adding his address and occupation, or if he omits his occupation only. (*Parsons* v. *Brand*; *Coulson* v. *Dickson*.) The business address of the witness suffices. (*Simmons* v. *Woodward*.) When the same witness attests the signatures of two grantors, and separate attestation clauses are used, it is not necessary that he should add his address and description twice. (*Bird* v. *Davey*.)

Consideration must be not less than 30*l.*

Sect. 12 makes the sweeping provision that every bill made or given in consideration of any sum under 30*l.* shall be void. A curious case (*Davies* v. *Usher*) was decided under this section. There A. applied for a loan of 15*l.*, and the following device was adopted in order to avoid the section and procure the giving of a bill of sale for 15*l.*, which would be valid in spite of it. The consideration was stated to be 30*l.*, of which 15*l.* was to be repayable on demand. Immediately after the execution of the bill the grantee demanded repayment of 15*l.*, which was repaid. It was held that, in the absence of evidence to show the transaction was a sham, the bill was valid. But such a bill of sale would now be held void altogether, as it has been since decided that the money must not be repayable on demand nor a certain time after demand. (See *Heatherington* v. *Groome*, *Bishop* v. *Beale*.)

Bill of sale must be drawn in the statutory form.

Another great change is effected by sect. 9, which provides that a bill of sale given to secure money shall be void, unless made in accordance with the schedule to the act. A great number of cases have been decided under this section. Thus, it has been held that the bill must in express terms show what rate of interest is to be paid. (*Myers* v. *Elliott*), and a bill providing for the capitalizing of interest was held void, as not following the form. (*Davis* v. *Burton*; *Goldstrow* v. *Tallerman*; and see *Weardale Iron Co.* v. *Hodson*.) So also was a bill reserving a lump sum by way of interest. (*Blankestein* v. *Robertson*.) But where there was a covenant by the grantor to insure, and power to the grantee to seize if receipts for the premiums were not duly produced, the bill was held good; and so was a bill of sale of furniture containing a covenant not to remove the goods except for repairs and to restore any goods worn out, these covenants being regarded as necessary to the maintenance of the security. (See *Seed* v. *Bradley*, and see *Duff* v. *Valentine* and *Hammond* v. *Hocking*.) Where there is a covenant to pay the money secured on demand, this does not sufficiently comply with the form. (*Re Williams*; *Melville* v. *Stringer*; *Heatherington* v. *Groome*.) Nor is there such compliance when the money is repayable a certain time after demand. (See *Bishop & Son* v. *Beale*; *Clemson* v. *Townsend*.) Again, the bill will be void if the grantor is expressed to assign as "beneficial owner," with the design of incorporating

covenants for title under the Conveyancing Act, 1881. (*Ex parte Stanford, Re Barber.*) The general principle would seem to be, a bill of sale will not be "in accordance with the form" if its legal effect, had it been enforceable, would have been in any respect different from the legal effect of the form, or if the departure from the form is reasonably calculated to deceive. (*Ex parte Stanford, Re Barber.*) In a recent case (*Woodward* v. *Heseltine*) it was said that a bill is not in accordance with the statutory form when it departs from that form in anything which is not merely a matter of verbal difference, or in anything which is characteristic of that form. (And see *Topley* v. *Crosbie.*)

Where an attornment is made by a mortgagor in favour of a mortgagee so as to enable the mortgagee to distrain for his interest, which constitutes a bill of sale to secure money (see *Ex parte Kennedy, Re Wills*), it would appear that the statutory form need not be used. (See *dictum* in the judgment in *Green* v. *Marsh.*)

We give a table showing the cases in which, where the form has not been strictly complied with, the bill has been held good, and where held void.

Table of some Important Cases decided under Sect. 9 of the Act of 1882.

Void.	*Good.*
Bill to secure future advances, where time for repayment thereof and dates of payment of interest not stated. (*Cook* v. *Taylor.*)	Bill assigning goods which may be substituted for the goods specifically assigned. (*Bonchette* v. *Attenborough, Seed* v. *Bradley.*)
Bill given as security against moneys the grantee might be called on to pay under an indemnity given by him. (*Hughes* v. *Little.*)	Bill making the loan re-payable by unequal instalments. (*Re Cleaver.*)
Bill providing that the bill itself should remain in the hands of the grantee after payment off of the amount secured. (*Watson* v. *Strickland.*)	Bill declaring that the power of sale conferred by the Conveyancing Act, 1881, shall be exercisable by the mortgagee as if sect. 20 of the act had not been enacted. (*Re Morrit.*)
A bill empowering the creditor to seize if debtor fails on demand to produce last receipt for rent, or if he compounds with his creditors. (*Barr* v. *Kingsford.*)	Bill containing clause empowering the mortgagee, for the purpose of seizing the goods, to break open doors and windows. (*Ibid.*; and *Lumley* v. *Simmons.*)

Void.

Bill allowing seizure upon the grantor taking the benefit of any Bankruptcy Act. (*Gilroy* v. *Bowey.*)

Bill which does not show at what rate interest is reserved. (*Myers* v. *Elliott.*)

Bill reserving a lump sum by way of interest. (*Blankenstein* v. *Robertson.*)

Bill reserving compound interest. (*Goldstrow* v. *Tallerman.*)

Bill containing clause that the covenants in another indenture which is recited shall be performed. (*Gee* v. *Barnes.*)

Bill in which the grantor covenants for himself, and "for any other person claiming any interest in the chattels assigned." (*Liverpool Commercial, &c. Co.* v. *Richardson.*)

Bill describing property too generally, as where it is described as "forty-five oil paintings in gilt frames." (*Witt* v. *Banner*, but compare *Cooper* v. *Higgins.*)

Bill with clause that out of moneys to be realized by a sale the expenses of the sale and the security shall be first discharged. (*Calvert* v. *Thomas and Lloyd.*)

Bill made by grantor "as beneficial owner," thereby incorporating the covenants for title under the Conveyancing Act. (*Ex parte Stanford, Re Barber.*)

Bill containing a covenant by the grantor not to remove the goods without notice to the grantee, omitting the word "fraudulently" after "goods," and giving the grantee power to seize for breach of the covenant. (*Bardell* v. *Daykin.*)

Bill with clause that on a sale by the grantee the purchaser need not

Good.

Bill containing ordinary covenant for further assurance. (*Re Cleaver; Ex parte Rawlings.*)

Bill reserving a monthly instead of a yearly rate of interest. (*Lumley* v. *Simmons.*)

Bill with covenant by grantor not to remove goods without the consent of the grantee, and to make repayment by instalments. (*Ex-parte Payne, Re Coton.*)

Bill reserving payment of interest by amounts varying from time to time. (*Goldstrow* v. *Tallerman.*)

Bill reserving interest at five per cent. per month, the grantor agreeing to repay the loan by specified monthly instalments till a certain date, when the balance is to be paid. (*Edwards* v. *Marston.*)

Bill giving the grantee the right to sell the goods on the premises by private treaty or by public auction. (*Bourne* v. *Wall.*)

Bill in which, on the whole, the amount of interest payable is stated, though this does not at first clearly appear on the face thereof. (*Hazlewood* v. *Consolidated Co.*)

Bill which contains a covenant by the grantor to insure, and provides that if he does not produce the policy, or the receipt for the current premiums, the grantee shall be at liberty to enter and seize. (*Duff* v. *Valentine*, and *Hammond* v. *Hocking*, and see *Briggs* v. *Pike.*)

Bill which gives the grantor's name and address, and assigns goods "in the front room" without more. (*Merton* v. *Bown.*)

Bill of chattels made subject to a former registered bill of sale. (*Leader* v. *Thomas.*)

Bill accompanied by a bill of

Void.

inquire as to the validity of the seizure. (*Parsons* v. *Hargrave*; *Blaigberg* v. *Beckett*.)

Bill with clause providing that sums paid by the grantee for rent may be added to the principal moneys. (*Bianchi* v. *Offord*.)

Bill requiring the grantor to pay the rent of a house in which the goods mortgaged are, and, in default, adding such rent to the amount of the loan. (*Real and Personal Advance Co.* v. *Clears*.)

Bill containing a covenant by the grantor to pay rates and taxes, with a proviso that in default the grantee may pay them and add them to the security. (*Macey* v. *Gilbey*.)

Bill comprising after-acquired chattels not specifically described in the schedule held void even as against the grantor. (*Thomas* v. *Kelly*.)

Bill in which A., the grantee, described himself as the "Discount Bank of London, of which A. is proprietor," for it did not sufficiently appear whether the bank or A. was the grantee. (*Woodward* v. *Heseltine*.)

Bill comprising real estate as well as personal. (*Cochrane* v. *Entwistle*.)

A bill given to secure 300*l*. and simple interest, accompanied by a mortgage of land to secure the same 300*l*. and compound interest, is void under sect. 10 of the 1878 Act as to the chattels comprised in it, though not void altogether under sect. 9 of the 1882 Act. (*Edmonds* v. *Marcus*.)

Good.

exchange or promissory note. (*In re The Monetary Advance Co.*, but see *Counsel* v. *L. & W. District Co.*, *Ann* v. *Fisher*, and *Griffin* v. *Union Deposit Bank*.)

Bill giving grantee power to seize for whole of money secured if grantor make default in payment of any of the instalments by which the money repayable. (*Re Wood*, *Ex parte Wolfe*.)

A bill to secure 150*l*. and interest at 4*l*. per cent. per annum, the grantor agreeing with the grantee to pay the principal money by equal yearly instalments of 30*l*. until the whole of the principal and interest is fully paid, and the grantor further agreeing to pay interest on the said sum of 150*l*. at the rate of 4*l*. per cent. per annum, such interest being payable by quarterly payments in each year. (*Weardale Iron Co.* v. *Hodson*.)

A bill that the grantor shall provide for articles of furniture, set forth in the schedule, which shall be "worn out," other similar articles. (*Seed* v. *Bradley*.)

V. The Provisions of the Acts as to the Consideration, Registration, and Re-registration of a Bill of Sale.

The Consideration.

Consideration for bill of sale must be truly set forth.

You will have to be most careful in setting forth the consideration for which the bill is given, and you must bear in mind that any setting out of it which does not comply with the statutory provision will not be remedied by the satisfactory setting out of it in the receipt, which is generally appended at the foot of the bill or elsewhere; for it has been held that such a receipt forms no part of the bill, and so cannot be looked to for the purpose of curing any defect in the setting out of the consideration in the body of the bill. (See *Ex parte Charing Cross Bank, Re Parker.*)

All the circumstances attending the payment must be set out.

In order not to offend against the statutory provisions, you should set out the manner of payment of the consideration, and all the circumstances attending such payment, in the fullest possible way, taking especial care to show what sum of money is actually paid to and received by the grantor for the making of the bill. For this really constitutes the consideration for which the bill is given.

Cases illustrating rule.

If, for instance, it appears from the statement of the consideration in the bill that the grantor received 120*l.*, but the actual fact is that he only received 90*l.*, 30*l.* being retained by the grantee for interest and expenses, the bill does not in this case truly set forth the consideration for which it was given, and so will be void as against the grantor's trustee in bankruptcy. (See *Ex parte Charing Cross Bank.*) And if it is stated that the consideration consists of money "then owing," whereas part of the consideration consists of a promissory note by the grantee not due at the date of the bill, the consideration is not truly stated. (*Mayer & Fielder* v. *Middlewick.*) Again, if from the bill the consideration apparently received by the grantor is 700*l.*, but he only receives 692*l.* 10*s.*, 7*l.* 10*s.* being retained by the grantee for commission on the loan and for expenses in pursuance of a prior engagement, the consideration in this case will be deemed not to be truly stated, and the bill will be void as against an execution creditor. (*Hamilton* v. *Chaine.*) But it would seem, from the case of *Hamlyn* v. *Beltley*, that the bill will satisfy the requirements of the act, although part of the consideration as expressed to have been paid therein is retained to pay debts

which are *actually due* at the time of the execution from the grantor, the retention being made at his request. But this cannot be validly done if the debts for which the retention is made have not become due at the date of the execution of the bill. (*Ex parte Rolph, Re Spindler.*) This last-mentioned case shows also that if in the bill the consideration is expressed to be paid at a certain time, and this is not actually done, but a part of the money is retained by the request of the grantor partly to pay expenses and partly to pay rent to which the grantor is liable, but which has not yet become due, the consideration will be deemed not to have been truly stated, for even if the sums retained be taken to have been paid to the grantor, they were not paid at or before the execution of the deed when they were expressed to have been so paid in the bill. In this case the court said that the consideration was so much money then paid by the lender to the borrower, and an agreement by him to pay a further sum at a future day to someone else, and that ought to have been stated in the bill of sale. Again, in *Ex parte Firth, Re Cowburn*, it was held that where the amount of expenses incident to the preparation of the bill is deducted from the sum expressed in it to be the consideration, and only the balance is really paid to the grantor, the consideration is not truly stated. The case controls two previous cases. (*Ex parte National Mercantile Bank*, and *Ex parte Challinor.*) And the joint result is that if part of the consideration stated in a bill of sale is, by the grantor's directions given at the time of the execution of the deed, applied in satisfying one of his then existing debts, the money so paid may properly be stated in the deed to be *then* paid to him. (See *Richardson* v. *Harris.*) But the expenses of the preparation of the bill are not debts existing at the time of the execution of the deed, for they do not become due till the matter is completed. A recent case (*Ex parte Bolland, Re Roper*) shows that no money need actually pass at all. Here the consideration was expressed to be 2,000*l.* paid by the grantee to the grantor immediately before the execution of the deed, but no money was in fact paid, the 2,000*l.* being the unpaid balance of the purchase-money of certain leasehold property. The grantor became bankrupt, and his trustee sought to have the deed set aside as being void against him, on the ground that the

Cases illustrating the rule that the consideration must be truly set forth.

consideration was not truly stated. But the court held that the consideration was properly stated, and that it was not necessary that the form should be gone through of first paying off the debt, then readvancing the money. (See also *Credit Co.* v. *Pott*, *Ex parte National Mercantile Bank*; *Ex parte Johnson*, *Re Chapman*; *Stainforth* v. *Capon*; *Re Hochaday*, *Ex parte Nelson*.) If the consideration stated to be paid upon execution is not actually then paid, but consists of sums of money previously paid on various dates, as where it is stated to be 65*l*., now paid by the grantee to the grantor, but as a matter of fact that sum has been advanced by instalments at different times, all previous to the execution of the bill, the consideration will not in this case be considered to have been truly stated. (*Ex parte Berwick*, *Re Young*. See and distinguish *Ex parte Allam*.) An obvious mistake in the statement of the consideration will not invalidate the bill. (See *Ex parte Winter*.)

Obvious mistakes as to consideration.

If the bill of sale is governed by the Act of 1878, and not by the Act of 1882, the omission to state the consideration truly will not render it void as between grantor and grantee, but merely as to third parties (*Davis* v. *Goodman*); but if the bill of sale falls within the Act of 1882, then the omission makes the bill of sale void altogether as to the chattels comprised in it, though it does not prevent the grantee suing on the covenant to repay the money contained in the bill. (*Haseltine* v. *Simmonds*.)

A difference between bill governed by Act of 1878 and one governed by Act of 1882.

Registration.

Upon applying to register the bill, not only must a true copy thereof, and of every schedule or inventory annexed to it, and of every attestation of its execution, be filed, but also an affidavit proving the following facts: the date of the execution; the due execution and attestation of the bill; and containing a description of the residence and occupation of the grantor (see hereon *Greenham* v. *Child*), and of *every* (see *Pickard* v. *Marriage*) attesting witness. This affidavit may be sworn before a master of the High Court or a commissioner; and wilfully to make a false affidavit for the purposes of the act will subject the offender to the consequences of perjury.

True copy and affidavit must be filed. Residence of grantor must be stated.

It is not necessary that the grantor should be precisely and minutely described, so that an error in his christian name will

be immaterial so long as he can be identified from the description. (See *Ex parte McHattie*, *Re Wood*, and *Central Bank* v. *Hawkins*.) Thus, where Henry Arthur Salmon granted a bill in which, and in the affidavit for registration, he is described as Alfred Salmon, the bill was held good, even though the misdescription was wilful, there being no evidence that the grantee was aware of the misdescription, or that anyone was deceived. (*Downs* v. *Salmon*; and see *Lea* v. *Kendrick*.) But it is necessary that the grantor's residence and occupation should be accurately described. A misdescription, however, to be fatal, must be one which is calculated to mislead creditors. Thus, if it is but a slight one, and one which is, on the face of it, evidently a mistake and would deceive nobody, it will not invalidate the bill. For instance, where New Street, Blackfriars, was stated to be in the county of Middlesex, instead of in the city of London, it was held that this misdescription of the grantor's residence did not invalidate the bill. (*Hewer* v. *Cox*.) But where the number of the house in a street was incorrectly stated, it was held that this was fatal. (*Murray* v. *Mackenzie*; see also *Blount* v. *Harris*.) It has been held that the residence meant by the act is the place where the person carries on his business, and where he can be found during the day, and not the place where he merely sleeps. (See *Attenboro* v. *Thompson*.) If the grantor has more than one place of residence, it is not necessary to mention them all, but his principal place of occupation or business should be selected. (See *Ex parte National Mercantile Bank*, *Re Haynes*.) The place of residence to be given is the residence at the date of the making of the affidavit, and this address is to be given if it should happen that the grantor has changed his place of residence between the execution of the bill of sale and the making of the affidavit. (*Button* v. *O'Neil*.)

Some illustrations.

Occupation of grantor must be stated.

An accurate description of the grantor's occupation must be given. Thus, it has been held that "gentleman" is not a sufficient description of a solicitor or a solicitor's clerk (*Taunton* v. *Sanomer*; *Beales* v. *Tennant*), or, as a rule, of any person who has a recognised profession, business, or avocation. (See *Ex parte Hooman*, *Re O'Connor*; *Allen* v. *Thompson*; *Matthews* v. *Buchanan*.) At the same time it is not necessary to mention,

when he is out of business, any occupation which he has only temporarily or casually followed. (*Smith* v. *Cheese*; *Morewood* v. *South Yorkshire Co.*; *Feast* v. *Robinson.*) Thus, where the grantor was described as "until lately a commercial traveller," without any further description, it was held insufficient. (*Castle* v. *Downton.*) But where the grantor carried on two distinct businesses, the bill will not be void if only one of the trades is referred to, if there was no intention and no likelihood of deceiving. (*Throssell* v. *Marsh.*)

Discrepancy between bill of sale and affidavit vitiates the bill.

If there is a discrepancy between the descriptions in the bill and in the affidavit, the bill will be invalidated as a rule. It has, however, been held that if the description of the grantor's residence or occupation be insufficient in the affidavit, yet if the description in the bill be alluded to therein, the defect will be cured. (*Jones* v. *Harris.*) But as to the result when no such allusion is made, see *Murray* v. *Mackenzie*, which would seem to show that the bill would in such a case be invalidated.

Affidavit must state that bill was attested by solicitor.

This affidavit must also state that the bill was duly attested by the attesting witness, which has been interpreted to mean that it must state that he was present and witnessed the due execution. If the affidavit omits to make this statement the registration will be invalidated. (*Ford* v. *Kettle.*) So, too, if the affidavit merely verifies the signature of the solicitor to the attestation, and describes his residence and occupation, it will be insufficient. (*Sharp* v. *Birch.*) Again, if the jurat to the affidavit omits to give the name of the commissioner before whom the affidavit was sworn, the registration is void. (*Brown* v. *London and County Advance Co.*) When there are several witnesses, the affidavit must give the description and occupation of each witness, and not merely of the necessary witness, the solicitor. (See *Pickard* v. *Marriage.*)

How registration is effected,

As to the manner in which registration is to be effected, the bill, with any schedule or inventory annexed to it or referred to in it, must be presented to the registrar within seven days of execution, and a true copy of the bill, and of the schedule or inventory, and of every attestation to its execution, and of the affidavit, must be filed with the registrar at the same time. And if the bill is given subject to any defeasance or condition, or to any declaration of trust not contained in it, such defeasance, &c.,

is deemed part of the bill, and must be written on the same paper as the bill before registration, and must be truly set forth in the copy filed. (See *Edwards* v. *Marcus*.) The functions of the registrar are ministerial, not judicial, so that he must receive and file the papers, though they are insufficient. (See *Needham* v. *Johnson*.) The validity or otherwise of the papers is to be decided by the court, and not by the registrar. It is his duty to keep a register and enter therein the name, residence, and occupation of the grantor of every bill filed, and certain other particulars, and he must also keep an index of the names of the grantors. If the registration within the prescribed time be accidentally omitted, or if the name, residence, or occupation be omitted or mis-stated, any judge of the High Court, if satisfied that the omission or the mis-statement was due to accident or inadvertence, can order it to be rectified. (See *Re Dobbin's Settlement*.)

Recent case.

and within what time.

As we said, the registration is to be effected within seven days of execution, or (at least as to bills of sale within the Act of 1882) if executed abroad within seven days of the time the bill of sale would have reached England if posted immediately after execution. If this time expires on a Sunday, or other day on which the registrar's office is closed, the bill may be registered on the next following day on which the office is open; and the time for registration may be extended by the court when the omission to register has been purely accidental. Before the seven days have expired the bill is good, though not registered. So that if within these seven days the grantee takes possession of the goods he will get a good title to them, and this though the grantor has meanwhile become bankrupt, or the goods have been seized by an execution creditor. (See *Marples* v. *Hartley*.) But after the seven days have expired, if the bill be not then registered, it will be void as against an execution creditor, notwithstanding the fact that the creditor has had, before his debt was contracted, notice that the bill of sale had been given. (*Edwards* v. *Edwards*.)

Successive bills of sale on same chattels to secure same debt not now allowed.

Formerly, in order to avoid the necessity of registration, the device of giving successive bills of sale was resorted to. Immediately before the expiration of the period allowed for the registration of the first bill, a second bill was given for the same debt and comprising the same property. Then, again, just

before the time for registering this second bill expired, a third bill was given in its place, and so on, the bills being renewed from time to time, but always within the twenty-one days, the time allowed for registration under the Act of 1854. But this device will now be of no use; for by the Act of 1878 it is provided that if a second bill be executed within seven days from the execution of an unregistered bill, and includes the same chattels, or some of them, then if the second bill be given as a security for the same debt or part of it, it shall be absolutely null and void.

Transfers need not be registered.

The Act of 1878 provides that the transfer of a bill of sale need not be registered. This provision, and also the provision as to the manner of registration, apply to all bills of sale, and not merely to those governed by the Act of 1878.

Re-registration.

Bill must be re-registered every five years.

Besides registration in the first instance, the bill must be re-registered every five years, or the registration will become void. The re-registration is effected by filing an affidavit mentioning the date of the bill, and of the last registration thereof, and the names, residences, and occupations of the parties to it, and stating that it is still a subsisting security. This affidavit must, if the grantor's residence has not been changed, give the same description of the grantor's address as that contained in the bill itself; or if that is erroneous, it should allude to it as being so, and give the correct address. (*Webster* v. *Morris*.) These provisions also apply to all bills.

The Result of Omission to Register and Re-register.

If bill not properly registered, &c., it is void as against trustee and execution creditor.

The consequences of non-registration and non-re-registration are that the bill, though binding on the grantor (see *Davis* v. *Goodman*) will afford the grantee no security in the event of the grantor's bankruptcy, or of any process being issued against him; it will be absolutely void as against his trustee in bankruptcy, and as against a sheriff's officer or other person seizing any chattels comprised in it, and as against all persons on whose behalf writs of execution against the property of the grantor have been issued. But it will only be void as regards

goods or chattels included therein, which are in the possession, or apparent possession, of the grantor, at or after the filing of the bankruptcy petition or the seizure under the writ of execution. Besides being good as between the parties, if the grantor has died insolvent, and his estate is being administered, the bill, though unregistered, will be good as against the unsecured creditors, and, in spite of the Judicature Acts, the rules in bankruptcy will not apply in this case. (*Re Knott.*) And if a company give an unregistered bill, it will nevertheless be good as against the liquidator on the winding-up of the company. (See *Re Marine Mansions Co.*)

Power of court to cure omission to register.

To meet the case of an accidental omission to register or re-register a bill of sale or a defective registration thereof, it is provided by sect. 14 of the 1878 Act that any judge of the High Court, on being satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed, or the omission or mis-statement of the name, residence, or occupation of any person was accidental or due to inadvertence, may order such omission or mis-statement to be rectified by the insertion in the register of the true name, &c., or by extending the time for registration, &c., as he may think fit. It has been held that the court's discretion under this section can only be exercised so long as, at the time of application, no third party, *e.g.*, a trustee in bankruptcy, has acquired a right to the chattels comprised in the bill of sale. (*In re Parsons and Furber.*)

VI. What amounts to Apparent Possession, &c. under Act.

The doctrine only applies to bills executed under the 1878 Act.

If a bill to which the Act of 1882 applies is not duly attested and registered, it will be absolutely void and must be treated as mere waste paper. (*Davies* v. *Keen.*) And if the consideration for such a bill is not truly set forth the bill is absolutely void as to the chattels comprised in it though not further or otherwise. (*Haseltine* v. *Simmons.*) But as to bills to which this act does not apply, but to which the Act of 1878 does, the omission to comply with the above requirements only makes them void as

against certain specified persons, and only as to goods, &c., in the possession or apparent possession of the grantor. The 8th section of the Act of 1878, which makes this provision, is now repealed by the Act of 1882, so that the doctrine of apparent possession will only apply to bills to secure money registered before the 1st of November, 1882 (see sect. 15), and to absolute bills of sale, whether made before or after that date. (See *Swift* v. *Pannell.*)

Cases illustrating the doctrine of apparent possession.

It has been held that if the goods are delivered, for instance, to a banker for safe custody, or to a warehouseman, they will still be constructively in the possession of their owner. (See *Ancona* v. *Rogers.*) But goods seized in execution by a sheriff's officer will not be in the apparent possession of the grantor of a bill of sale over them, even though the grantee himself has taken no possession. (*Ex parte Saffery.*) Such, too, will be the case where the goods are in the custody of the receiver appointed in an action, provided he has given the security, if any, required. (See *Taylor* v. *Eckersley.*) As to what is meant by apparent possession, the act provides that "personal chattels shall be in the apparent possession of the grantor of the bill so long as they remain or are in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or are used or enjoyed by him in any place whatever, notwithstanding that formal possession thereof may have been taken by or given to any other person." In illustration of this section may be cited the case of *Ex parte Hooman.* Here A. assigned furniture to B., and B. sent someone to the house to look after it, but A. continued to live in the house and to use the furniture. It was held that it still remained in the apparent possession of A. But for the chattels to be on premises occupied by the grantor, he must be the actual occupier of them, and not a mere tenant. Thus, if the grantor keeps the key of the premises, this will amount to *primâ facie* evidence of his possession. (See *Ancona* v. *Rogers* and *Pickard* v. *Marriage.*) Where the grantor of the bill remained in the house, but subsequently let it, and the tenant actually entered, it was held that the furniture in the house ceased to be in the apparent possession of the grantor. (*Ex parte Morrison.*) But if the grantee merely puts a man in possession, that possession will be deemed formal if the grantor

keeps the key of the house and goes in and out at his pleasure. (*Seal* v. *Claridge*.) The contrary, however, will be the case when the grantee has obtained exclusive possession of both the goods and the premises on which they are. (*Smith* v. *Wall*.) The general rule is, that the goods will be deemed to be in the grantor's possession unless something has taken place which amounts to notice to the public generally that the grantor's possession has ceased. Thus, if the grantor discontinues to reside on the premises, this will be enough to show that the goods thereon are no longer in his possession, even though his business continue to be carried on and his name remain over the door. (*Davis* v. *Jones*.) And if the grantee takes possession of the goods, and advertises them for sale as being the goods of the grantor, and that they are to be sold under a bill of sale, this will amount to an act showing that the grantor's possession has ceased, even though the goods still remain in the grantor's house. (*Emanuel* v. *Bridger*.) But a mere unsuccessful attempt by the grantee to get possession of the goods will not be enough. (See *Ancona* v. *Rogers*.)

VII. How far the Order and Disposition of the Bankruptcy Act is affected by Registration.

Reputed ownership clause applies to bills under the 1882 Act not under the 1878 Act.

As to the effect of registration with regard to the "order and disposition" clause of the Bankruptcy Act, it is sufficient here merely to observe that the 20th section of the Bills of Sale Act, 1878, which provided (in effect) that the doctrine of reputed ownership should not apply to bills executed on or after the 1st January, 1879, provided they were duly registered under the act, is repealed by the Act of 1882 (sect. 15); so that since the 1st November, 1882, the doctrine is again applicable to goods comprised in bills of sale given to secure money on or after 1st November, 1882, though they may be duly registered, provided the grantee can be considered the true owner of the goods, notwithstanding sect. 7 of the act only allows him to seize under certain circumstances (see *Re Stanley*); but as the order and disposition clause now only applies to goods used by the grantor in

the ordinary course of his trade or business, and not to the goods of a trader generally (Bankruptcy Act, 1883, s. 44), it follows that the grantee of a bill in due form, and properly attested and registered, is protected, even though he allows the goods to remain in the grantor's possession until bankruptcy, unless the goods are goods used by the grantor in his trade or business. Further, the holder of an absolute bill of sale, whether registered before or after 1st November, 1882, if attested and registered as required by the Act of 1878, is also fully protected as against the trustee in bankruptcy, even though the goods are trade goods; and this is also so as to bills of sale to secure money registered before 1st November, 1882; for the repeal of sect. 20 of the Act of 1878 does not apply to these bills, the goods comprised in which are taken out of the grantor's order and disposition by the provisions of the said 20th section of the 1878 Act. (See *Eli Hickson* v. *Darlow* and *Swift* v. *Pannell*.) By the Bills of Sale Acts, 1890 and 1891, certain letters of hypothecation are not bills of sale within either the 1878 or 1882 Act (see *ante*, p. 265), but the order and disposition clause in the Bankruptcy Act applies to the goods comprised in such letters. (See sect. 2 of the 1890 Act.)

The above consideration of the Bills of Sale Acts will show you that your freedom in drafting a bill of sale is very much restricted, and especially will this be the case when the bill is required by your client as a security for money advanced; and absolute bills of sale of chattels are extremely rare. In drawing a bill of sale by way of mortgage, you should have before you the form given in the schedule to the Act of 1882, and follow it as far as possible.

VIII. Some Miscellaneous Matters.

Searches.

Searches.

By the Act of 1882, the provisions of which on this point supersede those contained in the Act of 1878, any person may at all reasonable times search the register on the payment of a prescribed fee, and subject to the prescribed regulations, and

may inspect, examine, and make extracts from any registered bill without being required to make any written application or to specify any particulars in reference thereto; but these extracts are to be limited to the dates of execution, registration, renewal of registration, the names, addresses, and occupations of the parties, the amount of the consideration, and other prescribed particulars.

To render it possible, without the necessity of searching in London, to discover whether a bill of sale on chattels has been given by a person residing in the provinces, sect. 11 of the 1882 Act provides that when the affidavit describes the grantor's residence as being in some place outside the London bankruptcy district, or where the bill of sale describes the chattels as being out of such district, the registrar must, within three days after registration, transmit an abstract of the contents of the bill to the county court registrar in whose district such places are situate, and if such places are in the districts of different registrars, then to each such registrar; such abstract to be filed and indexed, and persons are to be at liberty to search, inspect, make extracts from, and obtain copies of the abstract.

Entry of Satisfaction.

Entry of satisfaction.

Provision is made for the entry of satisfaction, on its being proved that the debt for which the bill was given has been discharged, and the registrar may order a memorandum of satisfaction to be written on any registered copy of the bill.

The Risks attending a Bill of Sale.

You will understand that though a bill of sale is in the statutory form, properly executed, attested, and registered, it by no means follows that the grantee may not lose the benefit of his security. In the first place, the grantor remains in the possession of the goods, and might defeat the grantee's right by selling the goods in market overt; secondly, the goods are liable to depreciate in value; thirdly, if the goods are used by the grantor in the course of his trade or business, and bankruptcy ensues before the grantee has taken the goods out of the order and disposition of the grantor, the goods will pass to the trustee

in bankruptcy of the grantor, and the grantee will be left to prove for his debt against the estate as an ordinary unsecured creditor; and, lastly, the goods may be taken by way of distress for rent, rates, or taxes, and so lost to the grantee; for these and other reasons no prudent person lends his money on personal chattels.

The Statutory Form.

The following is a copy of the form of a bill of sale given in Act of 1882. You will act wisely if called upon to draft a bill of sale, to do as little else as possible than fill in the blanks, bearing in mind that if by altering the statutory form you alter its legal effect you make it mere waste paper, and leave the grantee with the same remedies to recover the money lent on the security of the bill as if the bill had never been executed. (*Davies* v. *Rees.*) You may, however, add any clause which may be necessary "for the maintenance of the security" without vitiating the document.

Form of Bill of Sale.

THIS INDENTURE made the day of , between A. B. of of the one part, and C. D. of of the other part, Witnesseth that in consideration of the sum of £ now paid to A. B. by C. D., the receipt of which the said A. B. hereby acknowledges [*or whatever else the consideration may be*], he the said A. B. doth hereby assign unto C. D., his executors, administrators, and assigns, all and singular the several chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of £ , and interest thereon at the rate of per cent. per annum [*or whatever else may be the rate*]. And the said A. B. doth *further agree* and declare that he will duly pay to the said C. D. the principal sum aforesaid, together with the interest then due, by equal payments of £ , on the day of [*or whatever else may be the stipulated times or time of payment*]. And the said A. B. doth also agree with the said C. D. that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*].

Provided always, that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said C. D. for any cause other than those specified in section seven of the Bills of Sale Act (1878) Amendment Act, 1882.

In witness, &c.

Signed and sealed by the said A. B. in the presence of me, E. F.
[*Add witness's name, address, and description.*]

THE SCHEDULE.

Stamps, &c.

Bills of sale to secure money must be stamped as mortgages with 2*s.* 6*d.* per cent. *ad valorem* duty, whereas absolute bills of sale must be stamped as conveyances of property with an *ad valorem* duty of 5*s.* for every 50*l.* of the consideration money, and where no consideration exists, as in post-nuptial settlements, with a 10*s.* deed stamp.

An affidavit registering or re-registering a bill of sale requires no stamp. The fee for filing a bill of sale and affidavit is 5*s.* when the consideration for the bill does not exceed 100*l.*, and 10*s.* if it exceeds 100*l.* and does not exceed 200*l.*, and 1*l.* above 200*l.* The fee for filing the affidavit for the purpose of re-registration is 10*s.*, and for filing fiat of satisfaction is 5*s.*

Legal Charges.

Your charge for preparing bills of sale will be regulated by the work done, and will be provided by Schedule V. of the Solicitors' Remuneration Order, 1881, and not by the scale of charges allowed by Schedule I. of the act.

Part IV.—LESSORS AND LESSEES.

We propose to consider this subject under the following headings:—

I. The parties to a lease.
II. The form and contents of a lease.
III. Some miscellaneous matters.

I. The Parties to a Lease.

Introductory.

As upon purchasing land, so upon taking a lease, the first point for your consideration will be the power of the intended lessor to grant the lease. As a rule, it may be said that a person who has power to sell his land, has also power to lease it; but there are cases in which a person can make a lease, although he cannot dispose of it by way of sale. We shall, therefore, in the first place consider the powers of leasing possessed by various persons who are under some disability, or who are limited owners of the land only. But before doing so, we would remind you that, in the absence of contract to the contrary, acting for the lessee, you cannot, if the lease about to be granted is an original lease, that is to say, if the intending lessor is the freeholder, call upon him to render an abstract to you of his title, or put any question to him concerning his title, but you must take it for granted that his title is such as to enable him to make the lease proposed. And if the intending lessor is not the freeholder, but a leaseholder only, that is to say, if the lease proposed to be granted is a sub-lease or sub-sub-lease, you will only be able to call upon the intending lessor to produce to you the lease or sub-lease out of which the proposed lease is to be carved; moreover, you cannot

call for or raise any questions upon the reversionary title, which, in the case of an intending sub-lease, will be the freehold reversion, in the case of a sub-sub-lease, a leasehold reversion. This is the conjoint effect of sect. 2 of the Vendor and Purchaser Act, 1874, and sect. 13 of the Conveyancing Act, 1881. (See *Gosling* v. *Woolf*.) It follows that if there is any doubt in the case of an original lease as to the lessor's title, and in case of sub-leases as to the reversionary title, a contract to be allowed to inspect the title should be, in the interests of the lessee, insisted upon; and it has been quite recently held that if an intending lessor stipulates with the intending lessee to deliver to him an abstract of title, not only must the deeds be produced for examination to the intending lessee, but also they must be produced at any time during the continuance of the lease in support of the lessee's title. To secure this the lessor must give to the lessee, if the deeds are in his possession, an acknowledgment of the lessee's right to production, or if they are in the possession of someone else (*e.g.*, a mortgagee of the property), a covenant that they shall be produced. (*Re Pursell and Deakin's Contracts.*)

Leases by and to Infants.

Infants' leases: (i) At common law;

By the common law an infant might avoid a lease, whether it was beneficial to him or not, granted by him during his minority, when he attained full age, and his heirs might do the same if he died before that time. Nor could his guardian grant a lease which would be binding on him when he attained majority; and indeed, a guardian by nature or for nurture only, could make no better lease than one at will. (*Piggot* v. *Garnish.*) But an infant, on attaining twenty-one, could confirm a lease granted by himself during minority (unless it was one which was not beneficial to him, in which case it seems to have been considered void *ab initio*), either expressly or impliedly, as by acceptance of rent or by mere words only, or apparently by not expressly repudiating the lease within a reasonable time after attaining majority. (*Edwards* v. *Carter.*) The Infants' Relief Act, 1874, does not apply to conveyances of land, and therefore does not apply so as to prevent ratification in such a

case (see *ante*, pp. 3—6). By a statute, 11 Geo. 4, c. 65, the court was empowered to make a binding lease of an infant's land, and this, even where he was only seised in fee in reversion after a life estate by the curtesy vested in his father. (See *Re Litchford.*) Later, by the Conveyancing Act, 1881, s. 41, it was enacted that "where a person in his own right seised of or entitled to land in fee, or for any leasehold interest, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877."

(ii) Under 11 Geo. 4, c. 65;

(iii) Under the Conveyancing Act, 1881;

The effect of this last provision is, that the court may, under sect. 4 of that act, authorize leases of the infant's land on the terms in that section contained; and direct what person shall execute the lease as lessor; and the further effect will be to enable the infant or his guardian, under sect. 46, to make leases *without any application to the court.* That section enables such leases to be made by persons entitled to the possession or receipt of the rents and profits of any settled estate; and sect. 49 says, that all powers given by the act may be exercised by guardians on behalf of infants.

Recourse to this act, however, will not now be frequent, for, by sect. 59 of the Settled Land Act, 1882, where a person seised of land in his own right is an infant, the land will be deemed settled land, and the tenant thereof a tenant for life within that act; and by sect. 60 the powers given thereby to tenants for life may be exercised on an infant's behalf by the trustees of the settlement, and, if there are none, by such person and in such manner as the court may order. Under that statute, as we shall see hereafter, tenants for life can make leases in different cases for terms of ninety-nine, sixty, and twenty-one years. (See *Re The Duke of Newcastle's Estate.*)

(iv) Under the Settled Land Act, 1882.

Leases to infants.

As to the power of an infant to accept a lease, he may do so, but he will be able to avoid it on attaining majority (*Ketsey's Case*); but he must make his election to do so within a reasonable time, or he will become liable to pay the rent and the arrears of it, and to perform the covenants contained therein. (*L. & N. W. Rail. Co.* v. *MacMichael; Edwards* v. *Carter.*) And by 11 Geo. 4, c. 65, s. 12, leases to infants may be surrendered and renewed under the direction of the Chancery Division.

Leases by and to Persons Non compotes mentis.

Leases by and to persons *non compotes mentis*—how far binding.

The lease of a person *non compos mentis* is apparently binding on him unless the lessee knew of his insanity and took some advantage of it (*Molton* v. *Camroux*); and by the Lunacy Act, 1890 (s. 126), the Lord Chancellor may authorize a lunatic's committee to grant leases of his estate; also under the Settled Estates Act the Chancery Division may grant leases of a lunatic's settled estates, subject to the provisions of that act. And a person *non compos mentis* may take a lease for his benefit; and a lunatic's committee may, under the Lunacy Act, 1890, by the direction of the Lord Chancellor, surrender leases and take new ones. Further, by the Settled Land Act, 1882, provision is made by which leases of a settled estate of which a lunatic is tenant for life may be made. (See Part IV., Ch. III., *post*; and see *Re Baggs*.)

Leases by Married Women.

Leases of married women's lands, when good.

Married women can grant valid leases of property which is theirs for their separate estate, whether by law, statute or otherwise. If the property is not hers for her separate use, a lease by a married woman without the concurrence of her husband is void. (*Goodright* v. *Stravan*.) But a lease may be made by her, her husband concurring, and the deed being acknowledged under the Fines and Recoveries Act; and under the Settled Estates Act, 1877, husbands entitled to estates in the right of their wives may, with the leave of the court, make leases of the land subject to the provisions of that act, and without such leave they may lease it for any term not exceeding twenty-one years, the lease to take effect in possession, and otherwise to conform to the provisions of the act.

When voidable.

A lease of the wife's *freehold land* (not made under the powers of any statute, and the land not belonging to her for her separate use) by the husband and wife, or by the husband alone, if by deed, will be good during the coverture; but the wife may avoid it on the husband's death, unless she confirms it either expressly or impliedly. (See *Toler* v. *Slater*.) It seems that if such a lease be made by parol it will determine of itself

on the husband's death, and be incapable of confirmation by the wife. (*Parry* v. *Hindle*.) If the husband survives the wife and becomes tenant by his curtesy, the lease will be valid till his death, if the term extend so long; but if he do not become such a tenant, it is void as against the wife's heir. (*Howe* v. *Scarrot*.) As to *leaseholds* which are not the wife's for her separate use, the husband has full power to assign or sub-lease them, and the assignment or sub-demise will be good even though the wife survive him.

Leases to married women.

As to leases to a married woman, the old law was that she might take a lease; but it would be voidable by her husband, or after his death by herself or her heirs. (See *Swaine* v. *Holman*.) Leases to married women may be surrendered and renewed under the direction of the Chancery Division by 11 Geo. 4, c. 65, s. 12.

Effect of the M.W.P. Act, 1882.

Under the Married Women's Property Act, 1882, it would appear that a married woman can take and make a lease as if a *feme sole*.

Leases by Copyholders.

Leases by copyholders —how far good.

Copyholders, as we have previously pointed out, cannot, except by a special custom of the manor, make leases for more than one year without incurring a forfeiture of their estate. But if they do make a demise for a longer term, it is not absolutely void, but will be good against all persons but the lord of the manor, who may avoid or confirm it at his option. (*Doe* v. *Bousfield*.) But the lord may (even though only tenant for life, Settled Land Act, 1882, see *post*, p. 455) empower his tenant to grant leases for more than a year by licence; this, however, is entirely in his discretion. (*R.* v. *Hall*.) A lease by a copyholder "for life" determines upon his own death. (*Haddon* v. *Arrowsmith*.)

Leases by Reversioners.

Leases by reversioners.

If a remainderman or reversioner grants a lease during the continuance of the particular estate which precedes his remainder or reversion, the lease will take effect in possession as soon as the particular estate determines.

Leases by and to Corporations.

(1) Leases by corporations generally.

Unless they are restrained by statute, corporations may grant leases, but the leases must in all cases be under seal; if, however, they be not under seal, and the tenant enters and pays rent, he will be able to hold as tenant from year to year on the terms of the instrument, so far as they may be applicable to such tenancy. (See *Ecclesiastical Commissioners* v. *Morral.*) The Crown can in general grant leases for thirty-one years or three lives. (See 1 Anne, c. 7, s. 5, and 10 Geo. 4, c. 50.) As to ecclesiastical corporations, these are in some cases disabled from leasing, and in others empowered to do so by a number of statutes known as Enabling and Disabling or Restraining Statutes. On taking a lease from such a corporation these statutes should be consulted by you.

(2) By municipal corporations.

Municipal corporations are prohibited from granting leases for terms exceeding thirty-one years, unless they obtain the consent of the Treasury to grant longer leases, or unless the lease is a renewed one. But they may grant building leases for terms not exceeding seventy-five years. (45 & 46 Vict. c. 50, ss. 108, 109.) Leases may be made to corporations, but they must not be of terms of very long duration. A term of 100 years has been held to bring the land into mortmain, and so incur forfeiture. (*Rowles* v. *Mason.*)

Leases by Agents.

Leases by agents.

In the granting of a lease, it very often happens that your negotiations for it are carried on without seeing the owner of the land at all, but through the medium of a land or house agent. It becomes then important to inquire what power of granting leases such agents generally possess. If an agent has sufficient authority, a lease granted by him will bind his principal; such authority should as a rule be a power of attorney, and if he is to grant leases by deed, the power of attorney must also be by deed; and whatever form his authority be in, you must see that, in taking a lease from him, he does not exceed it, for if he does so his principal will not be *primâ facie* bound, though he may subsequently adopt and ratify the agent's act in writing, in which case the lease will become binding upon him. In case the

When they bind the principal.

agent has no authority, or, having one, exceeds it, you will not be without some remedy, for by executing a lease as agent for another, he impliedly warrants that he has sufficient authority for his acts, and if it turns out that he has no such authority, you may sue him or his representatives for the breach of such warranty. (See *Pow* v. *Davis* and *Collen* v. *Wright*.) Another case in which you will have a remedy against the agent is where he executes the lease in his own name instead of as agent for and in the name of his principal. (See *Clay* v. *Southern*.) And this is so even though throughout the document he has described himself as agent for another. (*Tanner* v. *Christian*.) Sect. 46 of the Conveyancing Act, 1881, which you will remember enables the donee of a power of attorney effectually to exercise it in his own name, would nevertheless not seem to take away this liability, though it would make the principal liable if the agent was acting within his authority, without the necessity of having to bring in any parol evidence to charge him, which formerly had to be done in such a case. (See *Higgins* v. *Senior*.) As to the extent of the authority, it has been held that a land agent, as such, has no authority to enter into agreements for leases (*Ridgway* v. *Morton*), so that you should see that he has express power to enter into such contracts. Again, it is doubtful if a house agent has any implied power to let persons into possession, though but slight evidence will be required to show that he has express power to do so. (See *Slack* v. *Crewe*.) House agents for letting a furnished house whose rent exceeds 25*l*. must be licensed under 24 & 25 Vict. c. 21, s. 10, but the term "house agent" under this act does not include an agent employed to manage landed estates, a solicitor, or a licensed auctioneer. (Sect. 13.)

When they do not.

How far land agents can lease.

Leases by Executors and Administrators.

An executor may make a demise of his testator's leaseholds, even before probate, as he derives his power from the will, not the probate; but an administrator cannot demise before he obtains a grant of letters of administration, for it is from these that he derives his authority. And a lease by one of several executors is valid, as executors have a joint and several autho-

Leases by executors and administrators.

When term bequeathed.

rity. The same remark applies to administrators. (See *Doe* v. *Hayes* and *Jacomb* v. *Harwood*, and *ante*, p. 197.) A lease may be taken from an executor even though the term is specifically bequeathed; but if you take a lease under such circumstances you should ascertain that the executor has not already assented to the bequest, for if he has done so he has no power to grant the lease. (See *Fenton* v. *Clegg* and *Austin* v. *Beddoe*.) If the executrix was a married woman, the husband was formerly the person who by law had the right to administer, and he had, therefore, to be joined in the lease, and the wife alone could not make a valid lease, for she could do no act in the administration of the estate without her husband's consent. A demise by the husband alone, however, was good. But now, by the Married Women's Property Act, 1882, a married woman, under the power of contracting conferred upon her by the act, can accept the office of executrix without her husband, and therefore will be able to make a lease, and otherwise act in the executrixship as if she were a *feme sole*.

When executrix is married.

Leases under Powers.

Leases under powers.

It may happen that the lessor derives his right to grant a lease from some power contained in a settlement. In accepting a lease from such a person you should see that the conditions and restrictions imposed by the power are strictly observed. It has been decided that a person acting under a power may do less than the power warrants him in doing, and if he does more it will at any rate be good to the extent of the power (see *Isherwood* v. *Oldknow*); so that a lease granted under a power, but exceeding it, will be good as between the lessee and the lessor, but may be void as against a remainderman or reversioner. (See *Yellowly* v. *Gower*.) But even where there has been a defective execution, there is a remedy provided by statute; for by 12 & 13 Vict. c. 26, s. 7, leases made under powers *bonâ fide*, and under which the lessees have entered, but which are invalid by reason of some deviation from the terms of the power, will be deemed in equity to be contracts for such leases as might properly have been granted; and by 13 Vict. c. 17, if the persons against whom such leases are invalid accept rent, and before or on its

Statutory provisions as to.

acceptance sign any receipt, memorandum, or note in writing confirming the lease, the lease will be deemed to be confirmed against them.

Leases under the Settled Estates Act, 1877, and the Settled Land Acts, 1882 to 1890.

Leases by limited owners—

(1) under the Settled Estates Act, 1877.

(a) With the leave of the court.

Under the Settled Estates Act, 1877, the Chancery Division of the High Court may authorize leases of settled estates for any length of time; but such leases must be granted subject to certain conditions; *e.g.*, they must take effect in possession, or within a year from the making thereof; must not exceed, for an agricultural or occupation lease twenty-one years (thirty-five years in Ireland), for a mining lease forty years, for a repairing lease sixty years, and for a building lease ninety-nine years; but the court may grant longer leases than those specified where such is shown to be the custom of the district, and it thinks it beneficial to the inheritance, except agricultural leases, which cannot be granted for longer than twenty-one years (thirty-five years in Ireland). Further, the best rent must be reserved, to be payable half-yearly, and nothing in the nature of a fine is to be reserved; the felling of trees must not, except in special circumstances, be authorized; and the lease must be by deed, and the lessee must execute a counterpart, and there must be a condition for re-entry on non-payment of rent for twenty-eight days, or less. The court may also authorize preliminary contracts to grant leases of the above nature, and the power to authorize the leases may be exercised either by approving of particular leases or by vesting powers of leasing in conformity with the provisions of the act in the trustees of the settlement. And when a lease is approved of, the court may direct what person shall execute the same as lessor. Application to the court must be made with the consents of certain persons mentioned in sect. 24, but this consent may be dispensed with in particular cases. (See sect. 25.) If the specified persons do not consent to or concur in the application, notice must be given to them, but this notice may also be dispensed with under certain circumstances. (See sects. 26—29.)

Formalities to be observed.

(b) Without such leave.

Further, under the same act, tenants for life, including ten-

ants in dower and tenants by the curtesy, and the other persons who are thereby included in the definition of a tenant for life may, when the settlement is made after the 1st November, 1856, and contains nothing to the contrary, without any application to the court, demise their lands, except the principal mansion house, and the demesnes thereof, for any term not exceeding twenty-one years, the lease to take effect in possession or within a year from the making thereof; to be by deed; to reserve the best rent without any fine; not to be without impeachment for waste; and to contain covenants for the payment of the rent, and other usual and proper covenants, and also a condition for re-entry in the case of the rent being in arrear for twenty-eight days; and further, a counterpart of every such lease is to be executed by the lessee. (Sect. 46.) All such leases will be valid against the persons granting them, and all other persons entitled to estates subsequent to them under the same settlement, if the lands are settled, and if not, against the wife of any husband who grants a lease of land to which he is entitled in her right, and against all persons claiming through or under the wife or husband of the person granting the same. (Sect. 47.) And the execution of any lease by the lessor is to be deemed sufficient evidence that a counterpart has been duly executed by the lessee. (Sect. 48.) This act, however, does not free a copyholder from the necessity of having to obtain the consent of the lord of the manor to a lease which exceeds a term of one year in duration. (Sect. 56.)

Formalities to be observed.

(2) Under the Settled Land Acts, 1882 to 1890.

Under the Settled Land Acts, 1882 to 1890 (considered more at length hereafter, see *post*, Part V.), a tenant for life—which includes tenants in tail in possession; tenants in tail who are barred by act of parliament from defeating or barring their estates tail, and although the reversion is in the crown, provided the lands were not granted by act of parliament for public services; tenants in fee with an executory limitation over; persons entitled to a base fee, though the reversion is in the crown; tenants for years determinable on a life; tenants *pur outre vie;* tenants in tail after possibility of issue extinct; tenants by the curtesy (but not tenants in dower); and any person entitled to the income of land under a trust or direction for payment to him during his own or any other life—whatever the date of the

settlement, and notwithstanding any provision therein to the contrary, may lease the settled land for any term not exceeding, in the case of a building lease, ninety-nine years; in the case of a mining lease, sixty years; and in the case of any other lease twenty-one years (or thirty-five years in Ireland); and such leases may in general be granted "whether involving waste or not." The lease must in general be by deed; must reserve the best rent, regard being had to any fine taken (which seems impliedly to confer the power of reserving or taking a fine, and which fine is by the Settled Land Act, 1884, declared to be "capital money"); it must contain a covenant for the payment of the rent, and a condition for re-entry if the rent is thirty days in arrear; and a counterpart must be executed by the lessee and delivered to the tenant for life.

Formalities to be observed.

And it is further provided, that a statement contained in the lease or endorsed thereon respecting any matter of fact or of calculation under the act in respect of the lease shall, in favour of the lessee and those claiming under him, be sufficient evidence of the matters stated, a provision which will prevent the making of requisitions as to whether the tenant for life has properly exercised his powers. Special provisions are made as to the conditions upon which building and mining leases may be granted. (Sects. 8—11.) Sect. 12 enables the tenant for life to carry into effect a contract for a lease entered into by his predecessor in title, to renew leases, and to confirm them; and by sect. 13 he may accept the surrender of a lease with or without consideration, and on surrender of part of the land only the rent may be apportioned, and any new or other lease may be granted which may contain additional land. By sect. 14 the tenant for life may grant to copyholders licences to lease in the same manner as he himself is entitled to do under the act with respect to freehold lands. Before entering into such a contract, the tenant for life must give a month's notice to the trustees of the settlement (of whom there must be two), and also to their solicitor, if known to him, of his intention to make the lease (sect. 45); but by sect. 5 of the amending Act of 1884, this notice may be waived or curtailed by the trustees; and by the Settled Land Act, 1890, no notice at all is necessary in the case of a lease for a term not exceeding twenty-one years, in which

Evidence that lease made under the act.

Some special provisions of the act.

the best rent is reserved without fine, and no licence is given to the lessee exempting him from liability for waste, and if the term does not exceed three years such a lease may be in writing instead of by deed.

Leases by tenants for years and others.

Tenants for years, unless restrained by express agreement, may make underleases of their lands, and a tenant from year to year may make a lease for a term of years which will last until his own term expires ; or he may underlet from year to year. And, in both cases, he will have a sufficient reversion in him to enable him to distrain for rent. (See *Pike* v. *Eyre*). As to a tenant at will, if he makes a lease it operates to determine his own estate at will, but nevertheless such a lease will be good as against himself by estoppel. (*Doe* v. *Carter*.) The same rule applies to a tenant at sufferance.

As to leases by mortgagors and mortgagees, see *ante*, p. 261.

II. The Form and Contents of a Lease.

When a deed is necessary.

It is unnecessary to do more than remind you that by the joint effect of 29 Car. 2, c. 3, ss. 1 and 2, and 8 & 9 Vict. c. 106, s. 2, leases must be made by deed, with the exception of terms not exceeding three years from the making thereof, and reserving a rent of at least two-thirds of the annual value of the land, which are valid though made by parol. But it is not using too strong language to say that these statutes, and especially the latter one, have practically been, to a great extent, set aside by the decisions in various cases. For, first of all, it was held (in *Doe* d. *Rigge* v. *Bell*) that where a lease was void under these statutes, and the lessee had entered into possession, and had paid, or agreed to pay, the rent, or any part thereof, he became a tenant from year to year upon the terms of the void lease, or agreement for a lease, so far as they were not inconsistent with such a tenancy. And, secondly, where there was a demise in writing, but which not being under seal was therefore void as a lease, it was held that when the tenant had entered into possession and paid rent, the demise would be good as an agreement for a lease (*Lee* v. *Smith*, and *Bond* v. *Rosling*), and that the tenant would hold as

tenant from year to year upon the terms of the agreement, so far as applicable to such a tenancy. And, thirdly, in *Walsh* v. *Lonsdale*, recently followed in *Crump* v. *Temple*, it has been held that by the effect of the Judicature Acts, in such a case as the last, the tenant, after entry, holds not merely as a tenant from year to year, but he is—at least, from the landlord's point of view—to be treated in every court as holding upon the terms which he would have held had he received a valid lease in pursuance of the agreement; so that a distress for the non-payment of an instalment of rent which, by the agreement, was payable in advance, was allowed in that case; though it may be well doubted whether under a mere agreement for a lease the landlord could, as he can under a lease, distrain on the stranger's goods, the fusion of law and equity effected by the Judicature Acts and the prevalence thereunder of equity rules not being allowed to operate prejudicially to the rights of third persons, and prior to those acts no distress could be made under a mere agreement for a lease. (*Joseph* v. *Lyons*; *Hellas* v. *Robinson*.) But except in this respect, it may be said that an agreement for a lease which sets forth the terms agreed upon is as good as a lease; and though it was not so at one time (see *Swain* v. *Ayres and Luck*), yet at the present time, and owing to sect. 5 of the Conveyancing Act, 1892, a tenant holding under an agreement for a lease, "if he has become entitled to his lease," can obtain relief if he breaks the terms of the agreement, under sect. 14 of the Conveyancing Act, 1881, just as if a lease had been actually granted to him; and although the stamp duty on agreements for leases, when the term does not exceed thirty-five years, is the same as the duty payable on a lease by deed for a similar term, yet where the term exceeds that term, the duty on an agreement for a lease is but sixpence; whereas on an actual lease the duty varies with the rent, and would be much more, so that in this respect an agreement for a lease is preferable to an actual lease.

Comparison between leases and agreements for leases.

An agreement for a lease must, under the 4th section of the Statute of Frauds, be in writing, however small the length of the term to be granted by the intended lease is, or else it will not afford ground for an action for damages; nor will it be specifically enforced unless taken out of the statute by part performance by the lessee of such a character as to render it impossible for him to

All agreements for leases must be in writing.

be restored to his original position. (See *Williams* v. *Evan.*) And even where there is a written agreement which satisfies the statute, if it omits to specify the time from which the term is to commence, specific performance might be and was refused in *Marshall* v. *Berridge;* but the last-named case must now be considered doubtful, as in a later case the court held that the day on which a lease was to commence may be collected from the agreement as a whole, and the day possession was given (if given) would be the time from which the term agreed upon would start. (*Re Lander's Contract.*) And an agreement for a lease which, if granted, might immediately be determined under a proviso for re-entry, will seemingly not be enforced; but the decisions on the point are somewhat conflicting. (See *Jones* v. *Jones; Gourlay* v. *Duke of Somerset; Lillie* v. *Leigh.*) Nor will specific performance be granted of an agreement for a lease from year to year merely (*Clayton* v. *Illingworth*), or for a lease when the term contracted to be granted has expired, or will expire before the judgment in the action for specific performance can be obtained. (*Nesbitt* v. *Meyer.*)

By whom the lease is prepared.

The lease is usually prepared by the solicitor of the lessor at the expense of the lessee. (*Smith* v. *Clegg.*) Acting for a lessee you should endeavour to arrange that the costs be divided between lessor and lessee.

Contents of the Lease.

We have now to consider and deal with the contents of an ordinary lease. This may be done by dealing with each clause in the order in which it appears in the deed itself. With the necessity for care as to date and parties we have already dealt (*ante*, p. 157). We come next in order to the recitals.

(i) The recitals.

Recitals are seldom contained in leases, but they may be made of use in some cases; for instance, when you are granting an underlease, and the lessee is prohibited from granting one without the licence of the lessor, it may be advisable to recite the fact that such licence has been obtained.

(ii) The consideration.

The consideration is generally stated to consist of the rent reserved, and the covenants and conditions to be observed and performed by the lessee.

It is not necessary to use any special or formal words, for any words will be sufficient which explain the intent that the one party shall divest himself of the possession, and the other come into it for a determinate time. (iii) The operative words.

And as to the parcels it does not seem necessary to add anything further to the remarks we have already made on the subject at p. 170. (iv) The parcels.

The office of the habendum is to specify the quantity and quality of the lessee's estate. And here the legal points as to the time of the commencement and end of the tenancy will require your consideration. The rule is, that the commencement of the term and its duration must be clearly shown. The term may commence at a present, a past, or a future date. If it is to commence from the date of the lease, or from the day of date, the day mentioned will be held to be included or excluded according to the intention of the parties as appearing from the instrument. (*Pugh* v. *Duke of Leeds.*) If the lease has no date, or an impossible one, as the 30th of February, the term will commence from the delivery of the deed. (See *Steele* v. *Mart*, and *Clayton's case.*) But if a day of date be mentioned, the term will commence from that day, and not from the delivery of the deed. (*Styles* v. *Wardle.*) If no date is mentioned, and the lease is not by deed, the term will commence upon the entry of the lessee. (*Kemp* v. *Darrett.*) Again, the date from which the term is to commence may be a past day, *e.g.*, the lease may be dated the 19th July, 1851, and the habendum be to hold from the 25th December, 1849, for a specified term, and in such a case the term will run from the date mentioned in the habendum (*Bird* v. *Baker*); but under such a lease the tenant would not be liable for breach of covenants committed before the date of the lease (*Jervis* v. *Tomkinson*; *Shaw* v. *Kay*); or the day for the commencement of the term may be one which has not yet arrived, *e.g.*, one year after the date of the lease: in this case the grantee does not become at once a lessee, strictly so called, but has merely an *interesse termini* in the land, a right which may be assigned by him, but which, till he has entered into possession, gives him no estate in the land; so that, for instance, he could not before entry maintain an action for trespass; and this would be the case even though the lease was made by bargain (v) The habendum— when the term may commence; *interesse termini.*

and sale and money payment, and so made to operate under the Statute of Uses, which statute, by executing the use, nominally puts the lessee in possession without actual entry. (See *Geary* v. *Bearcroft.*)

The duration of term must be fixed.

The duration of the term, or, in other words, the time for its expiration, must be fixed; so that if a lease is made to A. for as many years as B. shall live, this will not create a term of years, for it is uncertain how long B. may live. But a term may validly be granted for a term of 999 years if A. shall so long live; for here an ascertained period is stated upon which the term must come to an end. And we may remark here, that a difference will be made by the use of the word "and" in the one case, and the word "or" in the other; for a lease for a term of years, if A. and B. shall so long live, will determine on the death of the first of the two who dies; but if "or" had been used instead of "and" the term would continue until the death of the survivor. (*Vaux's case.*)

Some points as to duration of term.

With regard to the duration of the term, you should note the following points:—A lease "for years," without specifying the number of years, will be a lease for two years; and a lease "for one year, and so on from year to year," will be a lease for two years at least. (*Doe* v. *Green.*) When an option is given to determine the lease before the term expires of itself, and it is not stated who is to have that option, it will be the lessee alone who can exercise it; for the rule is, when the words are doubtful, that they shall be construed most strongly in favour of the grantee. (See *Doe* v. *Dixon.*) And where a lease was for twenty-one years, determinable, nevertheless, in seven or fourteen years, "if the parties shall so think fit," it was held that both parties must concur in exercising the option. (*Fowell* v. *Franter.*)

(vi) The reddendum—requisites to a rent;

The reddendum states the amount of the rent reserved and the times at which it is to be payable. Rent need not necessarily consist of money, but may be of labour, provisions, services, and the like, yet it must not consist of part of the thing itself which is demised, as the herbage or vesture, *i.e.*, it must not be something excepted from, but something newly created or reserved out of the premises. (See *Doe* v. *Lock.*) Secondly, rent must be reserved out of something upon which a distress

can be made in case it is not paid; so that, as a rule, rent cannot be reserved out of an incorporeal hereditament; and, thirdly, rent must be reserved to the lessor, and not to a stranger. (See *Oates* v. *Frith*.) The safest way, however, of reserving the rent is to make no mention at all of the person to whom it is reserved, for it will always be incident to the reversion and payable to the holder thereof from time to time without express mention. (See *Whitlock's case*.) And lastly, the rent must be certain in amount; but to the expression "certain" the maxim, "*Id certum est quod certum reddi potest*" applies, so that the actual amount need not be set down in so many words if some clue is afforded by which the exact amount may be ascertained.

(vii) The covenants—

Before proceeding to consider the express covenants in a lease, it will be well to call your attention to the obligations in connection with a lease implied by law. As we have already seen, the use of the word "demise" imports into the lease a covenant for quiet enjoyment, and the words "yielding and paying" in the reddendum imply a covenant on the lessee's part to pay the rent. (See *Hellier* v. *Casbard*.) Further, the law annexes by implication to every lease undertakings by the lessor that the lessee shall have the right to enjoy the premises free from interruption, so that in a case where there is no covenant for title the lessee, if evicted by some person having a better title than the lessor, may sue the lessor for indemnification. (*Style* v. *Hearing*.) And this will be the case even when the demise is by parol only (see *Bandy* v. *Cartwright*); but there is no covenant for quiet enjoyment implied in a tenancy from year to year. (*Schwartz* v. *Locket*.)

when implied.

What are usual implied covenants on part of lessee—

Besides the covenants implied by the use of particular words on a bare agreement for a lease, though nothing is said as to what covenants the lease shall contain, the law imports into it certain covenants. These are nearly co-extensive with what are known as "usual" covenants, and include, in addition to covenants to pay the rent, covenants by the lessee to pay the taxes (except landlord's taxes), to keep and deliver up at the end of the term the premises in good repair, and in certain cases to permit the lessor to enter and view the state of the premises and repairs.

(a) to pay taxes;

As to the implied covenant to pay taxes. The property tax is payable by the landlord, and he cannot, even by express contract, throw the burden of it on the tenant; for if the tenant pays it he may deduct it from his *next* rent, and the lessor is bound under a penalty to allow the deduction, and any agreement to pay the rent in full without allowing such deduction will be void. (5 & 6 Vict. c. 35, ss. 73, 103. See hereon *Lamb* v. *Brewster*.) And by the Tithe Act, 1891 (54 Vict. c. 8), the tithe rent-charge must be paid by the landlord, and any covenant by the tenant to pay it is void, and this even though the covenant to pay it was entered into before the act came into operation (1st April, 1891), though in this case the tenant is by the act required to repay to the landlord what the landlord is called upon to pay for tithe rent-charge. (And see *Jones* v. *Pott*.) Again, taxes which will, in the absence of agreement, fall on the landlord are the land tax (38 Geo. 3, c. 5), sewers rate (see *Palmer* v. *Erith*), and where the premises are let for a less term than three months the poor rates (32 & 33 Vict. c. 41). Other rates, as a rule, fall on the tenant. But even without express stipulation, a tenant may become liable to pay all rates and taxes but property tax and tithe rent-charge. This will be the case if a "net" rent or a rent "free from all deductions" is reserved. (See *Bennett* v. *Womack*; *Parish* v. *Sleeman*.)

(b) to keep in repair.

As to the implied covenant to keep in repair, this is a corollary to the rule that a tenant for years must not commit waste. As to a tenant from year to year, he is liable for that kind of waste known as voluntary waste; but he is only liable in a limited extent for permissive waste, and he is not bound to keep the premises in repair any further than to keep them wind and water tight (see *Leach* v. *Thomas*), and he would not be bound to repair the premises if they were burned down. (*Horsefall* v. *Mather*.) The implied liability of tenants for fixed terms of years to repair, in the absence of any stipulation, has seldom been raised in the courts; for leases for terms of years, in all cases, are furnished with express covenants on the subject, so that the implied liability, and its extent, has received but scant judicial interpretation. At one time it was questioned if they were liable at all for mere permissive waste (see *Herne* v. *Bembow*); but later cases show that they would be liable for such

waste. (See *Yellowby* v. *Gower*; *Harnett* v. *Maitland*; *Barnes* v. *Dowling*; *Davies* v. *Davies*; and see the Statute of Marlbridge.) They have always been liable for voluntary waste; but they would probably not be liable to repair the premises, if they were destroyed by storm or act of God; and by 14 Geo. 3, c. 78, if the premises are destroyed by accidental fire, the tenant is not liable; but he can apparently make himself liable by contract, as agreements between landlord and tenant are excepted. This statute, however, does not apply when the fire has been caused by negligence. (*Filliter* v. *Phippard*.)

No implied obligation on lessor to repair;

The lessor is under no implied obligation to repair (*Gott* v. *Gandy*), or to rebuild if the premises are destroyed by fire, even though he has covenanted for quiet enjoyment. (*Brown* v. *Quilter*.) Nor is there any implied covenant on his part that the premises are habitable (*Hart* v. *Windsor*), or fit for the purposes for which they are required (*Manchester Bonded Warehouse Co.* v. *Carr*), unless the subject of the lease is a house within the Housing of Working Classes Act, 1890 (see hereon *Walker and Wife* v. *Hobbs & Co.*), or is a furnished house, when there is, in certain cases, an implied condition that it is fit for habitation. (*Smith* v. *Marrable*; *Wilson* v. *Finch-Hatton*; *Bird* v. *Greville*; and *Cheston* v. *Powell*.)

but sometimes he has right to enter and view repairs.

As to the implied covenant for the landlord to enter and view the state of repair, this only applies when the landlord has covenanted to do repairs. (See *Saner* v. *Bilton*.) For the landlord has no right to go on the premises to make repairs in the absence of stipulation. (*Barker* v. *Barker*.)

Implied covenants run with the land.

A further point with regard to the implied covenants is, How far and upon whom are they binding? The rule is, that covenants, which are implied by the law, run with the land, and the liability to perform them will attach to the holder for the time being of the land. But this rule only applies to covenants which the law implies, such as the covenant for quiet enjoyment, which arises from the employment of the word "demise," and does not necessarily extend to those covenants which are not, strictly speaking, implied by law, but only differ from express covenants in that the meaning of the parties is obscurely expressed, but which are referable to a tacit agreement between them. (See *Williams* v. *Burrell*.) And lastly, implied

Why implied

covenants not relied on.

covenants only bind the covenantor so long as he retains possession of the estate; if he parts with it, his liability under them as to future breaches is gone. (See *Hartley* v. *King*, and *Taylor* v. *Shum*.) The rule with regard to express covenants is that the lessee or lessor remains liable on them, even after he has assigned the term or reversion. (See *Auriol* v. *Mills*, and *Thursby* v. *Plant*.)

As to covenants running with the land and reversion.

It is seldom, however, that the implied covenants are relied on by the parties, and in drawing a lease you should always insert express conditions. These, when employed, will nullify the effect of the implied covenants; for the rule is, that "*expressum facit cessare tacitum*." Thus the implied covenant for quiet enjoyment may be diminished in effect by an express one. (See *Merril* v. *Frame*, and *Stanley* v. *Hayes*.)

Before commenting on the various express covenants which you should insert in a lease, it will be well to consider how far these covenants are binding on the covenantors, and the effect on them of the assignment of the lease, or of the reversion. There is a distinction in this respect between covenants which do, and covenants which do not, run with the land. A covenant which runs with the land is one the liability to perform which, or the right to take advantage of which, passes upon an assignment. Before we turn to the question what covenants run with the land, we propose to consider the law as to covenants running with the reversion.

Covenants running with the reversion—

(a) at common law;

At common law covenants ran with the land, but not with the reversion, so that on an assignment of the reversion the assignee thereof was not able to take advantage of the covenants which the lessee had entered into with the lessor. But under 32 Hen. 8, c. 34, the assignee of the reversion can sue on the covenants of the lease (if at any rate it be under seal: *Brydges* v. *Lewis*) as fully as the original lessor, and the same rule applies to assignees of the term. (*Elliot* v. *Johnson*.) And further, by the Conveyancing Act, 1881, s. 10, the rent reserved by the lease, if made after 1881, and the benefit of every covenant and provision therein, having reference to the subject-matter of the lease to be observed and performed by the lessee, and every condition of re-entry and other condition therein, is to be annexed to and incident to the reversion; and a similar pro-

(b) under 32 Hen. 8;

(c) under the Conveyancing Act.

vision is made by sect. 11, that in leases made after 1881, the obligation of a covenant entered into by the lessor, and having reference to the subject-matter of the lease, shall, as far as he has power to bind the reversionary estate immediately expectant on the term, be incident to that reversionary estate; and each of these sections contains a provision that the assignee of the reversion in the one case shall have the right to enforce and take the benefit of the lessee's covenants and conditions, and that the lessee in the other shall have the right to enforce and take the benefit of the lessor's covenants against the assignee of the reversion, notwithstanding that the reversionary estate is severed. The event of severance of the reversion had already been provided for as far as regards *the condition of re-entry for non-payment of rent*, but no further, by sect. 3 of 22 & 23 Vict. c. 35. Before that act, a grantee of part of the reversion expectant on a lease could not take advantage of any condition in the lease; for it was a doctrine of the law that a condition was not divisible or apportionable. (*Dumpor's case.*) By sect. 3 of 22 & 23 Vict. c. 35, it was provided that, where the reversion was severed and the rent legally apportioned, the assignee of each part of the reversion should have the benefit of all conditions or powers of re-entry *for non-payment of rent* just as if those conditions had been specially reserved to him to secure the payment of the portion of the rent to which he became entitled after the assignment. This provision, then, is extended by the latter parts of sub-sect. 1 of sect 10, and sub-sect. 1 of sect. 11 of the Conveyancing Act, 1881, to *all* conditions, and it applies even when the rent has not been legally apportioned. Both these sections only apply to leases made after the commencement of the act.

When reversion severed—

(a) *Dumpor's case;*

(b) Lord St. Leonards' Act;

(c) Conveyancing Act, 1881.

Sect. 12 makes a provision as to the apportionment of conditions on severance of the reversion expectant on any lease, and enacts that where the reversion is severed the conditions of re-entry, &c., contained in the lease shall be apportioned, and that the owners of each part of the severed reversion shall be able to take advantage of them as if each severed reversionary estate had been the only reversionary estate expectant on the lease. It contains similar provisions that the conditions are to be apportioned in cases where part only of land comprised in a

As to the apportionment of conditions when reversion severed.

lease has been forfeited and another part remains subject to the lease. Here the lessor may take the benefit of the condition of re-entry (which, by the terms of the lease, related to the whole of the land, part of which has been forfeited, and which, as conditions were not formerly apportionable, would have been lost by such forfeiture) by entering on the part of land which still remains unforfeited. This section extends sect. 3 of 22 & 23 Vict. c. 35, which, as before mentioned, only related to conditions of re-entry for non-payment of rent, and only when the rent had been legally apportioned.

Covenants running with the land.

The rule then is, that all express covenants which run with the land will bind the assignee of the reversion, or may be taken advantage of by him, although he is not named. (*Martyn* v. *Clue.*) Thus, the covenants by the lessor for quiet enjoyment, for further assurance, for renewal, and as to repair, will bind the assigns, though they be not mentioned; and so will the lessee's covenants to pay rent, to repair, to cultivate the land in some particular way, to reside on the land, to insure, and other covenants of a similar nature. Again, though the covenant is one which does not run with the land, yet the assign may in some cases be bound by being expressly named; but this will only be the case with covenants to do something new upon the land demised, as, for instance, to build a wall or a house on it, or a covenant not to assign without licence. (*Williams* v. *Earle.*) Lastly, there are some covenants which will not bind the assigns, even when they are expressly mentioned. Such covenants are those which relate to something wholly collateral to the land demised, as a covenant to build a wall on some other land of the lessor's not comprised in the demise. (See *Spencer's case*, and see *ante*, pp. 178, 209.)

How far restrictive covenants of lessor bind lessee.

But the lessee may in some cases be bound by covenants which do not run with the land, and the assignee of a lease may be similarly so bound, though the covenant is one in which the assigns are not expressly mentioned; for a restrictive covenant which does not run with the land will nevertheless be binding on the lessee if he has notice of it. So that if the lessor has entered into any restrictive, as distinguished from affirmative, covenants, *e.g.*, that the adjoining land shall not be built upon except in a particular manner, a lessee of the

adjoining land from such lessor will be bound by that covenant if he has notice of it. (*Tulk* v. *Moxhay*; *Haywood* v. *Brunswick Building Society*; *L. & S. W. Rail. Co.* v. *Gomm*; *Austerberry* v. *Corporation of Oldham*; and *Hall* v. *Ewen and McNeff.*) And as the law deems that an intended lessee is to be taken in all cases as having notice of the lessor's title, he will be bound by any restrictive covenants which the latter has entered into with owners of adjoining property, so far as they bear on the enjoyment of the property demised. (See *Wilson* v. *Hart*, and *Patman* v. *Harland.*) And the assignee of a lease who has, at the time he acquired his interest in the premises, notice of any restrictive covenant affecting the premises, will be bound by that covenant. (See *Luker* v. *Dennis.*) And an under-lessee and his assigns are bound by covenants in the head lease if they had a fair opportunity of inspecting it. (*Hyde* v. *Warden.*) And an under-lessee will be bound by covenants in the assignment of the original lease, although he has had no notice of them, and although the person to whom the covenant was made has no reversion. (*Clements* v. *Wells*, and *Hall* v. *Ewen and McNeff.*)

Agreement to grant and take lease with "usual covenants."

Sometimes the parties have agreed that the lease shall contain all usual and proper covenants and provisoes. When a dispute arises between the parties as to what is to be included under this expression, it becomes a question for a jury to settle the meaning of the word "usual." (See *Bennett* v. *Womack*, and *Brookes* v. *Drysdale.*) Some covenants have been clearly settled by law to come within the description of "usual covenants," while others may be "usual" with reference to some custom of the district in which the premises are situate, or by the custom of some particular trade, or by other circumstances. The following covenants are clearly usual:—A covenant by the lessor for quiet enjoyment. (*Hall* v. *City of London Brewery.*) Covenants by the lessee to pay the rent and tenant's taxes, to keep and deliver up the premises in good repair, and to permit the lessor to inspect them; and a condition of re-entry for non-payment of rent is a usual condition. But a proviso that, if the premises are destroyed by fire or tempest, the lessor shall repair, or else the lessee shall be at liberty to quit the premises and be discharged from the payment of rent, is not a usual one.

What are usual covenants in this case.

What are not usual.

(*Doe* v. *Sandham.*) Nor are the following "usual" covenants or provisoes:—A clause for forfeiture or re-entry on the bankruptcy of the lessee (*Hyde* v. *Warden*), or on the breach of any of the covenants (*Hodgkinson* v. *Crowe; Anderson and Milner's Contracts*); a covenant in restraint of trade (*Propert* v. *Barker*); a covenant not to assign without licence (*Hampshire* v. *Wickens; Church* v. *Brown*, and *Henderson* v. *Hey*); a covenant not to assign without the lessor's consent, such consent not to be "unreasonably withheld" (*Bishop* v. *Taylor & Co.*); a covenant to leave assignments and underleases with the lessor's solicitor for registration (*Brookes* v. *Drysdale*); a covenant in the lease of a public-house, that the tenant shall do nothing to forfeit the licence (*Mawe* v. *Hindmarsh*); a covenant in the lease of a public-house by the tenant to reside upon the premises, and to personally conduct the business (*In re Lander and Bagley's Contracts*); a covenant to insure. (See *Cosser* v. *Dollinge.*) And where the lessee agreed to covenant to keep the premises in good repair, it was held that he was not entitled to have the general covenant qualified by the words "damages by fire or tempest only excepted." (*Sharpe* v. *Millington.*)

Sect. 9, Vendor and Purchaser Act, 1874, applies to disputes between lessor and lessee.

Any dispute between intending lessor and lessee, not being one in respect of the validity or existence of the contract for the lease, can be settled without action by means of a summons in chambers, under sect. 9 of the Vendor and Purchaser Act, 1874. (*Stephenson and Cox's Contracts.*)

We now propose to examine the rights and liabilities of the parties under some of the more usual covenants somewhat more in detail.

Covenant to pay Rent.

When rent is due;

Rent becomes due on the first moment of the day appointed for payment thereof, and if it is not paid by midnight of the same day it becomes in arrear. (*Dibble* v. *Bowater.*) But before the lessor can re-enter for non-payment of rent, he must make a demand for it before sunset, so as to enable the tenant to have sufficient light by which to count the money. (*Duppa* v. *Mayo.*)

how it should be paid;

The payment should be made in cash, but any other mode of payment will be good, *e. g.*, by cheque or by post if it is authorized by custom, or by the previous course

of dealing between the parties. (See *Hough* v. *May*.) But even where a bill of exchange, promissory note, or a bond is given in payment, the debt arising out of the liability to pay the rent is not thereby extinguished or merged therein, so as to supersede the lessor's right to distrain. The proper place to make the payment is upon the land or premises demised; but if there is an express covenant to pay the rent, it is the duty of the tenant to seek the landlord out, wherever he may be, and to make the payment to him. (*Haldane* v. *Johnson*.)

to whom it should be paid.

The payment should be made to the lessor in person, or to his authorized agent, or at least to a person to whom the tenant has previously paid it, with the approval, tacit or express, of the landlord, and a payment to his wife will not be good unless the lessee can show that she had his authority like any other agent to receive it. (*Brown* v. *Powell*.) If the lessor mortgage the premises subsequent to the demise, the lessee can nevertheless go on paying the rent to the lessor until he receives notice from the mortgagee requiring the payment to be made to him. (*Trent* v. *Hunt*.)

As to deducting rates and taxes.

As we have seen, the tenant may deduct any property tax, which he has paid, from his next rent, and this notwithstanding an agreement to the contrary (5 & 6 Vict. c. 35, ss. 73, 103); and so also if called upon to pay any tax or rate which, though leviable in the first instance on the occupier of the premises, is ultimately payable by the landlord, he may deduct these, in the absence of agreement to the contrary; but in all cases the deduction must be made from the instalment of rent paid next after the payment of such taxes or rates. They cannot be afterwards deducted or even recovered from the landlord by action. (*Cumming* v. *Bedborough*.) Even where the premises are destroyed by fire the tenant, in the absence of stipulation, must pay the rent in full (*Pindar* v. *Ainsley*); and for this reason you should, in the interests of the tenant, always take care to exempt him by express contract from this liability. But the rent will be entirely suspended if the tenant is evicted by the landlord until such time as he is reinstated into possession.

Landlord's remedies for rent.

Under the covenant for the payment of rent the landlord's remedy is by action. He has, in addition to this, a more efficacious remedy at common law—by distress. But he cannot exercise both these rights concurrently. If he has distrained he cannot sue on the covenant until he has realized the distress,

even though it is insufficient to satisfy the rent. (*Lehain* v. *Philpott.*) But if after the completion of the distress it be found insufficient, he may then sue on the covenant for the balance. (*Lear* v. *Edmonds.*) Six years' arrears of rent may be recovered (3 & 4 Will. 4, c. 27), or twenty years' arrears if there is a covenant to pay it (3 & 4 Will. 4, c. 42). See *Paget* v. *Foley; Hunter* v. *Nockolds;* and *Darby* v. *Tennant.* The action may be brought at any time during the tenancy; for as long as the relationship of landlord and tenant exists the twelve years in which an action to recover rent may be brought (37 & 38 Vict. c. 57) do not run. (*Grant* v. *Ellis; Lewis* v. *Graham;* and see *Howitt* v. *Harrington*, showing that this rule does not apply to quit rents due from a tenant of copyholds to the lord of the manor, which are barred after twelve years under 37 & 38 Vict. c. 57.) When the tenant's goods are seized in execution, the goods are not to be removed till the execution creditor has paid a year's rent to the landlord, if there be a year's arrears of rent due. (8 Anne, c. 14, s. 1.) But this does not apply to County Court executions. (51 & 52 Vict. c. 43, s. 160.) In these latter executions if the landlord in writing claims the rent from the bailiff within five days of the taking of the goods or before their removal, the bailiff is, in addition to the levy for the execution, to distrain for the rent claimed and costs for not exceeding one year's arrears, or four weeks where the tenancy is a weekly one.

Some points on distress.

As to the remedy by distress, we must refer you for details to some work specially treating of the subject of landlord and tenant, such as that of Woodfall, Smith, or Foa. The limits of our work will not permit us to do more than to enumerate in the briefest manner the following points on the subject:—

The requisites to a distress.

(1) There must be an actual existing demise at a fixed rent to make the right available. But the case of *Walsh* v. *Lonsdale*, followed by *Crump* v. *Temple*, shows that a distress can be made under a mere agreement for a lease if the tenant has entered. (See *ante*, p. 335.)

Moreover the lessor may distrain so long only as he has a reversion in himself. If he assigns his reversion he cannot distrain for arrears due before the assignment. It is also necessary that the rent be in arrear, *i. e.*, a distress cannot be put

in till after midnight of the day on which the rent becomes payable.

What chattels are privileged.

(2) Certain things on the demised premises are absolutely protected from distress, and certain other things are conditionally privileged, *i. e.*, they cannot be taken if there is other sufficient distress upon the premises. In the first class come animals *feræ naturæ*, things in actual use, things belonging to a third party, but left with the tenant to be wrought on in the way of his trade, fixtures, perishable articles, loose money, things *in custodiâ legis*, the goods of a lodger, and now tools of trade, bedding, &c., not exceeding in value 5*l*. (Distress Amendment Act, 1888.)

In the second class come the instruments of a man's trade or profession, and beasts of the plough, sheep, and implements of husbandry.

As to lodgers' goods.

The only class of these privileged articles on which we shall offer any remarks is goods of a lodger. These were not privileged at common law, and may *primâ facie* be seized at the present day; but, by 34 & 35 Vict. c. 79, if a lodger's goods are seized for arrears of rent due from his immediate landlord to the superior lessor, the lodger may serve the last-named with a notice in writing setting forth that the tenant in default has no right to the goods seized, but that they belong to the lodger; and also setting forth what rent the lodger owes to the tenant; and he may then pay to the superior landlord the rent he so owes, and, if the distraining lessor thereafter seizes his goods (which are to be specified in an inventory annexed to the declaration), he will be guilty of an illegal distress, and the lodger may obtain restitution of the goods by applying to a stipendiary magistrate or to two justices, and may also sue for damages. A person may be a "lodger," though his landlord occupies only a room in the basement and some attics. (*Phillips* v. *Henson.*) It has been recently held that the lodger must, to protect himself, give this declaration each time his goods are seized (*Thwaites* v. *Wilding*); but the declaration need not state that he is a lodger, or that no rent is due, if such be the fact. (*Ex parte Harris.*)

As to animals.

Animals being agisted could formerly be distrained; but now, by the Agricultural Holdings Act, 1883 (which only applies to agricultural and pastoral holdings, and to holdings held as

market gardens), they are privileged *sub modo*, that is to say, they cannot be taken until after other goods available have been exhausted, and then only for what is due for the feeding. Under the same act, animals on the premises solely for breeding purposes, and machinery on hire for use in business, are absolutely privileged.

Where the distress must be levied.

(3) The distress must, as a rule, be levied on the demised premises. But to this rule there are certain exceptions. Thus, (a) The crown may distrain on other lands of the tenant than those demised. (b) If the lessor coming to make a distress sees cattle on the land, and the tenant, to avoid the distress, drives them off the land, the landlord can follow them and distrain them. (c) By 8 Anne, c. 14, and 11 Geo. 2, c. 19, if a tenant fraudulently or clandestinely remove his goods after the rent has become payable to avoid a distress, the landlord may within thirty days follow and distrain those goods wherever he may find them.

Within what time it may be levied.

(4) It must be levied during the continuance of the tenancy, or, by 8 Anne, c. 14, within six months after the expiration thereof, provided that the landlord's title is still subsisting and the tenant is still in possession. Moreover, a distress must be made between sunrise and sunset. But the tenant may waive the irregularity of a distress made after sunset. (*Werth* v. *L. & W. Loan and Discount Co.*)

Entry, how effected.

(5) The entry under the distress must be peaceably effected, and an outer door may not be broken in in order to obtain access, even though the lease might authorize such breaking. (See *Ederik* v. *Hacker.*) Entry by an open skylight is considered a peaceable entry, and so is entry by getting over a wall. (*Miller* v. *Tebb; Long* v. *Clarke;* and see *American Concentrated Meat Co.* v. *Hendry.*)

Six years' arrears.

(6) Six years' arrears of rent can generally be distrained for, but for rent due in respect of agricultural, pastoral, or market-garden holdings, not more than one year's arrears can now be distrained (Agricultural Holdings Act, 1883, s. 44); and in all tenancies only six months' arrears are distrainable in the event of the tenant's bankruptcy. (Bankruptcy Act, 1890.)

Effect of death of landlord.

(7) If the landlord die his personal representatives have by statute a power of distress. (See 3 & 4 Will. 4, c. 42, s. 37.)

(8) Where, in the lease, the landlord reserves to himself the right to distrain for other sums than rent, *e.g.* premiums paid on policies, or on a lease of a public-house, for money due for beer supplied by him, and the document is not registered as a bill of sale, the agreement is not void as to the letting, but the clause giving distress for the debts is void under the Bills of Sale Acts. (*Ashby* v. *Pulbrook*; *Stevens* v. *Marston*.)

For the mode in which the distress is to be dealt with when taken, and the remedies of the tenant for a wrongful or excessive distress, we must refer you to some book specially dealing with the subject of landlord and tenant, and we will merely mention that, with regard to agricultural and pastoral tenancies and tenancies of market gardens, certain alterations in the law of distress have been made by the Agricultural Holdings Act, 1883. To this attention is called on a subsequent page. (See *post*, p. 376.)

Covenants to pay Taxes, &c.

What taxes included in usual covenant.

A covenant to pay "all taxes" will generally extend only to parliamentary taxes, which include land tax (and prior to the Tithe Act, 1891, but not now, by virtue of that act, a rent-charge in lieu of land tax), but not parochial or sewers rates, or others of like nature (see *Arran* v. *Crisp*); and a sewers rate does not come within the description of either a parliamentary or parochial tax. (*Palmer* v. *Erith*.) A covenant to pay "taxes and assessments" will not include a tithe rent-charge, though such rent-charge would have been included under the words "charges" or "outgoings." Now, by the Tithe Act, 1891, this tax, like property tax, cannot be thrown on the tenant. (See *Lockwood* v. *Wilson*, and *Parish* v. *Sleeman*.) But such a covenant will include poor rates. (*Mitchell* v. *Fordham*.) The word "rates" includes all parochial rates; and the county rate will be included under a covenant to pay "parochial taxes and assessments." (*R.* v. *Aylesbury*.) Water rate is included under a covenant to pay "all rates and taxes." (*Spanish Telegraph Co.* v. *Shepherd*.) This case, however, is doubtful, as in *Badcock* v. *Hunt* it was held that a covenant to pay "all rates, taxes," and impositions whatsoever and howsoever imposed, which might be assessed on the demised premises or

Meaning of "rates";

of "all duties";

of "all charges."

on the landlord or tenant in respect of them, did not apply to a water rate.) A covenant to pay "all duties which during the demise shall be imposed on the landlord of the premises" will include the costs of paving a street payable under the Metropolis Management Acts. (*Thompson* v. *Lapworth.*) But neither a covenant to pay all "charges imposed on the premises," nor a covenant to pay all "assessments," will include the expenses of drainage works done by local authorities under the Public Health Act, 1875, as such expenses are imposed by the act on the landlord personally, and not on the land. (See *Rawlins* v. *Biggs* and *Lyon* v. *Greenbow.*) Where the tenant is empowered to deduct sewers rate and land tax, and he builds on the land so as to increase its rateable value, he can only deduct the rate and tax on the original rent. (*Smith* v. *Humble;* and see *Watson* v. *Home.*) A covenant to pay "sewers rate, main drainage rate, and all other taxes, rates, impositions, and outgoings whatsoever to be charged *on the premises*," will not bind the tenant to pay the costs of paving done by a local board under the Public Health Act, 1875. (*Hill* v. *Edward.*) But the covenant may be couched in terms so wide as to cover such charges. (See *Aldridge* v. *Ferne; Batchelor* v. *Biggar.*)

Tenant's remedy for landlord's taxes.

If a landlord who has covenanted to pay a tax does not do so, and the tenant has to pay it, the tenant may either deduct it from his next rent or sue to recover the money paid. (*Watson* v. *Home; Graham* v. *Tate.*) If the tax is imposed on the landlord by statute, and the tenant has been called on to pay it, it would seem that the tenant's only remedy is to deduct the amount from his rent, and he cannot as a rule sue for it. (*Earle* v. *Maugham; Lamb* v. *Brewster; Dawson* v. *Linton.*) Deductions must always be made from the next rent. If that rent be paid in full without deduction, he cannot afterwards recover the amount of the tax or deduct it from a subsequent quarter's rent. (*Denby* v. *More; Andrew* v. *Hancock.*)

"Landlord's taxes" include property tax, land tax, sewers rates, tithe rent-charge (if the landlord is the owner of the land, 54 Vict. c. 8, s. 9.) "Tenant's taxes" include poor rates (where the term exceeds three months, 32 & 33 Vict. c. 41), all assessed taxes, *e. g.*, the inhabited house duty, county, borough, and highway rates, general district rates, and water and gas rates.

The Covenant to Repair.

When the landlord expressly covenants to repair, the covenant of course carries with it the right to enter on the land and remain there for a reasonable time to execute the repairs. (*Saner* v. *Bilton.*) In the absence of any provision whatever, the landlord has no right to enter on the premises to do repairs, even though the result of non-repair may cause a forfeiture of his own lease. (*Stocker* v. *Planet Building Society.*) This should be borne in mind in drawing a lease. If the landlord covenants to repair the inside of the demised premises, he cannot be sued for breach of the covenant until he has had notice of the want of repairs, and has thereupon neglected to make them, and this although the covenant contains no stipulation as to notice. (See *L. & S. W. Rail. Co.* v. *Flower.*) And the fact that the landlord omits to make repairs which he has covenanted to make does not give the tenant a right himself to make the repairs, and then deduct what he has paid for them from his rent (*Weigall* v. *Waters*), unless indeed the circumstances be very special (*e. g.*, the non-repair will cause injury to the tenant's goods), and the landlord after notice fails to do what is necessary (*Waters* v. *Weigall; Green* v. *Eales*); nor does it give him any power to quit before the end of the term or without giving notice where that is necessary. (*Surplice* v. *Farnsworth.*) By the landlord;

The tenant's covenant will vary with the nature of the property comprised in the lease; but as a rule it only applies to cases of leases of houses or buildings. Under a covenant to repair, the tenant's liabilities depend upon the condition of the building at the time of the commencement of the demise. For where an old and dilapidated building is leased the covenant to repair is not to be construed as meaning that the lessee shall restore it in a renewed form at the termination of his tenancy, nor even that he shall restore it in the same condition as that in which he found it; for an allowance is made for the decay resulting as a natural effect of time and the elements (*Guteridge* v. *Munyard*); and this is so even where the covenant is to repair and leave in repair. (See *Lister* v. *Lane*, in which Esher, M.R., said: "Where there is a general covenant to repair, the age and general condition of the house, at the com- by the tenant. Generally as to the effect of the covenant.

mencement of the tenancy, must be taken into consideration whether the covenant has been broken; in other words, when a very old building is demised, it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted, but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care.") This would appear to qualify *Hayne* v. *Payne*, where there was a covenant to "keep and *deliver up* in good repair," and it was held that the tenant must deliver up the old premises in good repair, and no allowance was to be made for the ravages of time and weather. Under a covenant to leave the premises in "tenantable repair," the tenant must give up possession of the premises in such repair as, having regard to the age, character, and locality of the premises, would make them reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take them (*Proudfoot* v. *Hart*); but the tenant need not execute decorative repairs, nor paint, unless painting is necessary to prevent the fabric of the premises from falling into decay. (*Crawford* v. *Newton.*) The tenant will be liable for damages for breach of this kind of covenant, even though the landlord pulls down the building at the end of the tenancy, and so suffers no real injury (*Inderwick* v. *Leach and others*); or even though an incoming tenant has agreed to reinstate the premises, and thus again the landlord suffers no real loss. (*Joyner* v. *Weekes.*) And further, if the covenant is "to put the premises *in habitable* repair," then he might possibly have to deliver them up in a better state than that in which he found them; for he must make them reasonably fit for the occupation of that class of persons likely to inhabit them. (*Belcher* v. *Mackintosh.*)

As to the extent of the covenant.

As to the extent of the covenant to repair, if it be a general one, it will comprise all the premises on the demised land, whether existing at the date of the demise or erected subsequently. But if it be "to repair the buildings demised," this will only refer to the houses, &c. built at the commencement of the demise. (*Worcester School Trustees* v. *Rowlands.*) No subsequent accident or disaster will excuse the tenant from performing the covenant; so that if the premises are burned down,

whether by accident, neglect, or otherwise (*e. g.*, are destroyed by a landslip), he must not only rebuild them (*Bullock* v. *Dommit*), but he must also go on paying his rent just as if no fire had happened. (*Belfour* v. *Weston.*) And in such a case the landlord who has insured will not be compelled to contribute the insurance money towards the rebuilding of the premises. (*Leeds* v. *Cheetham.*) But the lessee is not without remedy; for he may apply, as a person interested under 14 Geo. 3, c. 78, s. 83, to the insurance company to have the money laid out in the rebuilding or repairing of the premises, provided he make the application before the company have actually paid the moneys over to the landlord. The remedy which the landlord has, in the event of a breach of this covenant, is an action for damages; but the lease usually contains a proviso giving him a power to re-enter for forfeiture. Formerly, the tenant could obtain no relief, even in equity, against a forfeiture for breach of this covenant (*Hill* v. *Barclay*); but now, under the Conveyancing Act, 1881, sect. 14, the tenant, as we shall shortly see, can obtain relief. (See *post*, p. 365.) As to the damages for the breach of covenant, the measure of these is the cost necessary to put the premises in such repair as was originally contemplated by the covenant, not the actual loss occasioned to the landlord. (*Joyner* v. *Weekes.*) A tenant is liable to pay damages for dilapidations existing at the end of the lease owing to his neglect to repair, even though the landlord's intent is to pull down the premises after the expiration of the term. (*Inderwick* v. *Leach.*)

Remedy for breach of covenant.

The Covenant for Insurance.

This covenant is generally inserted in leases of houses and buildings of any description. It is sometimes stipulated that if the lessee when he covenants to insure makes default in paying the premiums, the lessor shall have power to pay them and to recover the same, with expenses, by distress, as if they were rent in arrear. But such a power of distress would involve the unpleasant necessity of registering the lease, like a bill of sale, under the Bills of Sale Acts (*Pulbrook* v. *Ashby; Stevens* v. *Marston*); and such registration does not seem possible without making the lease itself void. (*Cochrane* v. *Entwistle.*) Another

When a covenant to insure is inserted.

alternative is to secure the payment of the premiums by reserving an additional rent in case the premiums are not duly paid; and if a breach of the covenant occurs, the lessor may either take proceedings to recover the additional rent, or may proceed by ejectment or otherwise for the breach. (*Weston* v. *Managers.*) The covenant ought generally to make provision for the laying out of the insurance moneys in the reinstating of the premises (see *Lees* v. *Whitely*); and if it is the lessor who gives the covenant, the lessee ought to be required to enter into a counter covenant not to do anything to increase the rate of insurance.

What will amount to breach of covenant.

As to what constitutes a breach of the covenant to insure, it has been held that if the premises are left uninsured for any part, however small, of the term, even though no fire occur and proper insurances be afterwards effected, the covenant has nevertheless been broken. (*Penniall* v. *Harborne.*) And if the covenant provides that the insurance shall be effected in the joint names of the lessor and the lessee, it will be broken by insuring in the name of the lessee alone (*Doe* v. *Gladwin*); but a similar covenant is well performed if the insurance be effected in the name of the lessor alone. (*Havens* v. *Middleton.*) And further, a covenant to insure in the name of the lessor alone is broken by insuring in the names of the lessor and the lessee jointly. (See *Penniall* v. *Harborne.*) The breach of this covenant is a continuing breach, so that the receipt of rent by the lessor after the omission to insure will only operate to waive the breach so far as it has occurred prior to the receipt of the rent. (See *Doe* v. *Gladwin.*) Bear in mind that, where a landlord insures, he is not bound to lay out the policy moneys in reinstating the premises, and the tenant is still bound to rebuild if he has covenanted to repair. The provisions of 14 Geo. 3, c. 78, as to the power of having such policy moneys applied towards rebuilding or repairing, have already been mentioned (*ante*, p. 67.)

Restrictive Covenants.

The object of restrictive covenants.

In order to protect himself, or to prevent the property from being depreciated in value, the lessor often requires the lessee to enter into covenants which restrict his right to use the property in any manner he thinks fit. Thus, the lessee sometimes cove-

nants that he will reside on the demised premises. Such a covenant is good, and will be broken by the lessee doing any act which renders his residence there impossible. (See *Doe* v. *Hawke*.) So also he may bind himself to carry on a specific trade on the premises; but it seems that if he covenants not to carry on any other than a certain trade he is not bound to carry on the trade excepted. (See *Doe* v. *Guest*.) In framing a covenant of this nature you should be very careful as to the terms you use, for many of them have received a technical meaning, and they will be strictly construed. Thus, there is a difference between a "trade" and a "business," the latter term being the more extensive of the two. Thus, to keep a school or a private lunatic asylum, or a "home" for working girls, though not established for profit, is a "business," but does not come within the meaning of the word "trade." (See *Kemp* v. *Sober*; *Doe* v. *Bird*; *Bramwell* v. *Lang*; and *Rolls* v. *Miller*.)

Distinction between "trade" and "business."

The following brief digest of some of the decisions which have been established by the courts on the construction of covenants of this nature will perhaps be useful to you:—

Summary of illustrative cases in restrictive covenants.

To carry on the trade of a coach-maker is not a breach of a covenant not to carry on an "offensive trade" (*Bennet* v. *Sadler*); nor, necessarily, is the establishment of a slaughter-house business, since such a business may be so conducted as not to be offensive (*Rapley* v. *Grant*); nor is such a covenant broken by using the premises to store lucifer matches, though this might be a breach of a covenant not to carry on a dangerous trade. A covenant not to use premises as a coffee-house was held to be broken by selling light refreshments (tea, coffee, buns, &c.) to customers. (*Fitz* v. *Iles*.) The establishing of a national school is not a breach of a covenant "not to do anything which might be a nuisance" (*Harrison* v. *Good*); and a brew-house is not necessarily a "nuisance." (*Gorton* v. *Smart*.) But a covenant not to use the premises for the sale of spirituous liquors will be broken by a grocer selling wines and spirits across the counter. (*Fielden* v. *Slater*.) Technical meanings have been attached to the terms "beer-house" and "beer-shop"; and a sale of beer not to be drunk on the premises is not a breach of a covenant not to use the premises as a "beer-

house." (*London and North Western Rail. Co.* v. *Garrett*; and see *Pease* v. *Coates*, and also *Holt* v. *Collyer*, and *Nicholl* v. *Fleming*.) But a "beer-shop" includes a place where beer is sold for consumption off the premises. (See *Bishop of St. Albans* v. *Battersby*; *London, &c. Co.* v. *Field*.) A covenant to use the premises as a private lodging-house only is broken by using it as an office to receive orders for coal (*Wilkinson* v. *Rodgers*), or as a ladies' school (*Wickenden* v. *Webster*), or as a charitable institution for the board and education of children. (*German* v. *Chapman*.) A covenant not to carry on a specified business is broken by transacting the forbidden business merely as ancillary to another business. (*Buckle* v. *Fredericks*.) If the lessee covenants that the lessor, or some particular brewer, shall have the exclusive right to supply the premises with beer, this is a valid covenant (*Catt* v. *Tourle*); but there is understood the condition that good beer shall be supplied. (See *Thornton* v. *Sherratt*; *Luker* v. *Dennis*; *Edwick* v. *Hawkes*; *Clegg* v. *Hands*.)

How the right to enforce restrictive covenants may be lost.

We may here remark that the lessor may, under some circumstances, lose his right to enforce restrictive stipulations. Thus, he will so lose it by lying by, while a breach is being committed, in such a way as that it may be presumed that he has waived the breach, or by the acceptance of rent (*Doe* v. *Allen*), especially if he has knowledge of the breach for a long time, and has made no objection, and has received the rent. (See *Gibson* v. *Doeg*.) But the mere acquiescence in a trifling breach will not prevent him from exercising his right under the covenant to restrain more extensive ones. (*Richards* v. *Revitt*.)

Restrictive covenants by lessor.

The lessor sometimes enters into restrictive covenants: thus, he may covenant not to let the adjoining premises for the carrying on of some trade which the lessee intends to carry on upon the demised premises. But if, under such a covenant, he does not bind his assigns, any person to whom he may let the adjoining premises will not be bound by the covenant. (See *Kemp* v. *Bird*; *Master* v. *Hansard*.) In *Graham* v. *The Corporation of Newcastle*, it was held that a covenant to keep a space open and unbuilt upon was not broken by building under the surface of such space, since this does not interfere with the free access of light and air to the space which it is the object of the

covenant to preserve. Where a lessor lets his property in several lots to several lessees, and each lease contains restrictive covenants by each several lessee, the other lessees will not be entitled to obtain the benefit of those restrictive covenants unless the covenants are meant by the lessor, and are understood by all the lessees, to be a part of a building scheme, or otherwise for the common advantage of all the several lessees. (*Nottingham Patent Brick Co.* v. *Butler*; *Mackenzie* v. *Childers*.)

Covenants not to Assign or Underlease.

Covenants of this description are not "usual" covenants. (See *Church* v. *Brown*; *Bishop* v. *Taylor*.) Nor will they ever become "usual." (See *Henderson* v. *Hey*.) It seems doubtful if they run with the land, but they will bind the assigns if named. (*West* v. *Dobbs*.) The ordinary covenant does not, as a rule, prohibit assignment altogether, but generally stipulates that there shall be no assignment without the written consent or licence of the lessor. In drafting this covenant you must not forget the provisions of sect. 4 of the Conveyancing Act, 1892, which (in the absence of an expressed provision to the contrary) makes every such covenant subject to a proviso to the effect that no fine, or sum of money in the nature of a fine, shall be payable for or in respect of such licence or covenant; this proviso, however, not precluding the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or covenant. In the lessor's interest you will probably think it desirable to negative this proviso, and so leave the question of the lessor's demanding a fine as a condition to his giving his consent, to be determined according to the circumstances under which his consent is asked.

Covenants not to assign are not usual.

There have been many decisions on the point as to what will amount to a breach of a covenant of this kind: of course the question depends in a great measure on the wording of the particular covenant. Thus, it has been held that a condition not to assign without consent is not broken by a specific bequest of the term (*Fox* v. *Swan*), and, in general, it will not be broken by any assignment which occurs by the act of law and is

Not broken—(a) by bequest of term;

(b) by bankruptcy;

involuntary. So that no breach occurs by the bankruptcy of the lessee, though the effect thereof is to vest the term in the trustee (*Doe* v. *Beavan*), or by an execution, if, at least, it is suffered without collusion or any intention to evade the covenant (*Doe* v. *Carter*), or by a compulsory sale to a company under the Lands Clauses Act. (*Bailey* v. *De Crespigny.*) Again, it will not be broken by a mere equitable mortgage by deposit. (*Ex parte Drake.*) But a covenant may be worded so as to have a very wide effect; and if it be that the lessee shall not do or permit any act of alienation, it will be broken by any act the legal effect of which is to result in alienation. (See *Ex parte Eyston.*)

(c) by deposit of lease;

(d) by underletting.

A covenant not to assign is not broken by granting an underlease, unless the covenant be "not to assign, or otherwise part with the premises for the whole or any part of the term" (*Doe* v. *Worsley*); and letting as lodgings is not a breach of a covenant not to underlease. (*Doe* v. *Laming.*) But where partners were assignees of a lease which contained a covenant not to assign without the lessor's consent in writing, and upon the dissolution of the partnership one of the partners assigned all his interest to the other without such consent, this was held to be a breach. (*Varley* v. *Coppard;* and see *Finch* v. *Underwood.*) But if one of two joint lessees withdraws, leaving the other in sole possession of the premises, this would not be a breach. (*Corporation of Bristol* v. *Westcott.*)

A covenant not to "underlet" will apparently prevent an assignment of the term—an assignment being practically an underlease for the whole term—but this does not seem settled. (See *Greenaway* v. *Adams.*)

Effect of condition that lessor's consent shall not be withheld.

Sometimes the covenant is qualified by stipulating that the consent of the lessor, while necessary to the assignment, shall not be "arbitrarily withheld." These words are construed to mean that the consent shall not be unreasonably or unfairly withheld. The lessee cannot recover damages if the consent be arbitrarily withheld, but if it is so withheld he is at liberty to assign without consent. (See *Treloar* v. *Bigge*, and *Sear* v. *House Property, &c. Co.*) And if the consent is not to be withheld to an assignment to a "respectable person," the lessee may assign to such a person, without the consent of the lessor, and it will be no breach of the covenant. (*Hyde* v. *Warden.*) But

the covenant will be broken unless the lessor's assent is applied for. (*Barrow* v. *Isaacs.*)

As to damages recoverable for breach of this covenant, see *Lepla* v. *Rogers.*

Finally, we may observe that no relief will be given against a forfeiture incurred by the breach of a covenant of this kind, even under the Conveyancing Act, 1881. (*Barrow* v. *Isaacs.*)

Covenants by the Lessor.

The covenant for quiet enjoyment.

A covenant for quiet enjoyment may be insisted on under an agreement for a lease with the "usual" covenants and provisoes; but it is not an implied covenant in a tenancy from year to year. (*Schwartz* v. *Locket.*)

This covenant, as usually worded, will only extend to the lawful and not the wrongful acts of strangers, but it will include a wrongful eviction by the lessor himself. (*Dudley* v. *Folliet.*)

What will amount to a breach of covenant.

But if the lessor covenants against the acts of certain specified persons, a breach of the covenant will occur by a disturbance by such persons, whether rightful or wrongful. (*Nash* v. *Palmer.*) A covenant against disturbance by the lessor, and all persons "claiming or pretending to claim" a right in the demised premises, will have the same effect. (*Chaplin* v. *Southgate.*) But in determining what amounts to a breach of this covenant, the wording of it must in all cases be taken into consideration; for the liability of the lessor will depend on the extent to which he has bound himself. Thus, as we have already mentioned, he may by an express covenant render himself subject to a less amount of liability than he would be subject to under the implied covenant for quiet enjoyment, or he may make his liability less. So that, if he covenants as against the acts of himself, and of "all persons claiming by, through or under him," his covenant will not extend to an eviction by a person claiming by a title paramount to him (*Merril* v. *Frame*); nor will it include a person who claims against him, as in the case where a distress is made on the premises at the instance of a person claiming land-tax due from him before the demise (*Stanley* v. *Hayes*); though a person who claims under a settlement made by the lessor himself is a person "claiming under" him. (See

Illustrations.

Carpenter v. *Parker*.) Yet an underlessee who is disturbed by the original lessor has no remedy against his underlessor for breach of any covenant, since the original lessor does not claim by, through, or under the underlessor. (*Kelly* v. *Rogers*.) The covenant is not broken by the mere trespass by a stranger; nor does such a trespass operate as a just cause for the tenant to suspend his rent. (See *Paradine* v. *Jane*.) Nor is the injury caused by the bursting of a water-pipe, reasonably placed and properly maintained on the premises by the lessor, a breach of the covenant. (*Anderson* v. *Oppenheimer*.) Nor does the lessor break the covenant when he pulls down the premises in compliance with the orders of some statutory authority, *e.g.*, the county council. (*Hughes* v. *Hall*.) Any proceeding in a court of law which has the effect of interfering with the title and possession of the land is a breach of the covenant. But where the land was primarily subject to a condition against the carrying on of certain trades, and the lessee took his lease without notice thereof, and afterwards an injunction was obtained restraining him from carrying on one of the prohibited trades, it was held that the injunction did not amount to a breach of the lessor's covenant for quiet enjoyment; for it was said the covenant was meant to secure to the tenant the title and quiet possession of the land, but not to warrant that he might use the property for any purpose not specially provided against by restrictive covenants. (*Dennett* v. *Atherton*.) Again, the covenant will be broken if the lessor does anything in the assertion of a right hostile to the full enjoyment of the land by the covenantee. Thus, if the lease be of a watercourse, and the lessor afterwards stop the watercourse up (see *Pomfret* v. *Ricroft*); or of a house, and the lessor so build as to darken the lessee's windows (*Potts* v. *Smith*); or of a seam of coal, and the lessor afterwards so work the strata above as to cause the roof of the mine to fall in (*Shaw* v. *Stenton*), these will all be breaches of the covenant. The breach of this covenant will not discharge the tenant from any liability under the lease except the liability to pay rent (*Morrison* v. *Chadwick*); for the lessee has his action against the lessor for the eviction, and may thus obtain satisfaction for any loss or inconvenience which he may have suffered.

In *Edge* v. *Boileau* the landlord was held to have broken the

covenant by giving notice to a sub-tenant to pay the rent to him instead of to the sub-landlord (his, the landlord's, tenant), and this, though his tenant had broken his covenants, and the covenant for quiet enjoyment was made dependent on the tenant paying his rent and performing his covenants. But it is necessary that the tenant should act upon the notice.

Conditions for Re-entry and Forfeiture.

Distinction between power to re-enter and condition.

In addition to the covenants by the lessee, the lessor generally takes care to protect himself and ensure that the covenants shall be carried out, by inserting in the lease a condition that upon any breach of a covenant he shall have power to re-enter on the premises, or that the breaches shall cause a forfeiture of the lease. Such cases must be distinguished from the cases where the lease is granted upon a condition; for here, if the condition be broken, the lessor may enter without an express proviso on the point, but, for a mere breach of the covenant, he can only enter if there be a stipulation to that effect in the lease, his proper remedy being in damages. (See *Doe* v. *Phillips*.) Thus, if in the lease it is "stipulated and conditioned" that the lessee shall not assign, this is a condition, and no express power is needed to give the landlord the power to re-enter; but if the tenant merely agrees that he will not assign, this is not a condition, so that the lessor cannot re-enter in the absence of a proviso for re-entry. (See *Crawley* v. *Price*.)

When a proviso can be insisted on.

A proviso for re-entry on the breach of any of the covenants of the lease cannot be insisted on under a simple agreement for a lease. (*Hodgkinson* v. *Crowe*.) If, however, there has been an agreement for a lease to contain the usual covenants and conditions, the lessor can insist on a condition of re-entry for non-payment of rent, but not for breach of any other covenant. (*Hampshire* v. *Wickens; Anderson and Milner's Contracts*.) These provisoes for re-entry will be somewhat strictly construed, but still in accordance with the intentions of the parties. Thus, a proviso which, as worded, seems to be meant to apply to affirmative covenants only, will not be applied to the breach of negative covenants (see *Hyde* v. *Warden*) unless proper words are made use of in the proviso. As negative covenants cannot be "performed," a proviso for re-entry on making default in the

performance of any of the covenants will not authorize a re-entry for breach of such covenants (*Doe* v. *Marchetti*) ; but in the case of *Croft* v. *Lumley*, where the proviso was for re-entry "if the lessee made default of or in the performance of all or any of the covenants which on his part ought to be observed, performed, or kept," it was held that these words would embrace negative as well as positive covenants. (See also *Barrow* v. *Isaacs*.) And *Evans* v. *Davis* seems to show that the word "perform" applies to a positive, and the word "observe" to a negative, covenant. (See also *Waddiham* v. *Postmaster-General*.)

When previous demand is required before taking advantage of proviso.

Subject to the Conveyancing Acts, 1881 and 1892, the lessor may take advantage of the proviso for forfeiture immediately upon the breach without any preceding formalities; but, in the case of forfeiture for the breach of the covenant to pay rent, he is obliged by the common law to make a previous demand of the precise amount of rent due on the precise day on which it is payable, at a convenient time before sunset, upon the land, at the most notorious place of it, or at the place, if any, appointed for payment. (*Duppa* v. *Mayo*.) To avoid these troublesome formalities, the proviso in a lease generally stipulates that, "although no legal demand shall have been made for the payment of the rent," the lessor may re-enter. By statute law (4 Geo. 2, c. 28, and 15 & 16 Vict. c. 76) the landlord may re-enter when he has reserved the right to re-enter for non-payment of rent, even though these words do not appear in the proviso, and even though he makes no formal demand, but only in the event of the rent being in arrear for half a year, and there being no sufficient distress on the premises.

The exercise of the right of re-entry does not determine the lease.

Although there is a right of re-entry to secure the performance of a covenant, a mere breach thereof does not determine the lease; but it becomes voidable at the option of the lessor, but not of the lessee, as he would otherwise be able to take advantage of his own wrong. (*Rede* v. *Farr*.) And the lessor must do some clear act showing his intention of avoiding the lease, *e. g.*, by commencing proceedings in ejectment (*Jones* v. *Carter*), or some other such act; and when he has once elected to avoid the lease he cannot draw back. When the lessor enters for forfeiture, the rights of an underlessee in the lands are gone. (*G. W. Rail. Co.* v. *Smith*.)

Provisions of the Conveyancing Act as to rights of re-entry.

Before taking advantage of a proviso for re-entry or forfeiture, the lessor must now take into consideration the provisions of sect. 14 of the Conveyancing Act, 1881, which (except as regards covenants not to assign or underlet, or a covenant in a mining lease to allow the lessor to inspect the mine or the books, or (subject to the Conveyancing Act, 1892, referred to *infra*) a condition for forfeiture on the lessee becoming bankrupt or having his interest in the lease taken in execution) enacts that the right of re-entry shall not be enforceable, and the forfeiture shall not accrue unless—(i) the lessor has served on the lessee a notice (see hereon, *Cave* v. *Smith*) specifying the particular breach complained of, and, if the breach is capable of remedy, requiring in that notice that the lessee shall remedy it, and in all cases (*i. e.*, whether the breach is or is not remediable) requiring him to make a monetary compensation for the breach, and to pay all reasonable costs and expenses incurred in the employment of a solicitor or surveyor or otherwise in respect of the breach (see sect. 2 of the Conveyancing Act, 1892, overruling *Skinners' Co.* v. *Knight*, in which it was held that such costs could not be recovered); and (ii) the lessee for a reasonable time after the receipt of such notice has failed to remedy the breach where it is remediable, or to make reasonable compensation in money to the lessor's satisfaction. In *North London Land Co.* v. *Jacques* it was held that the notice was incomplete unless it demanded remedy and compensation, as well as stating the breach; but it has since been laid down by the Court of Appeal that compensation need not be demanded unless it is a case for compensation. (*Locke* v. *Pearse.*) And the court may refuse relief even though no notice was given at all. (*Scott* v. *Brown.*) And if the covenant broken is a covenant to repair, the lessor, before he can get judgment to eject the lessee, must, in addition to complying with sect. 14, prove that the premises were out of repair at the date of the writ. (*Skinners' Co.* v. *Knight.*)

The court can give the relief even if the breach has occurred before the commencement of the act. (*Quilter* v. *Mapleson.*) Relief will be given in all cases in which it can be granted on terms which will afford the landlord full protection. (*Ebbets* v. *Booth.*) Non-compliance with the statute does not take away the landlord's right of re-entry, but merely postpones it till he

has taken the steps the statute requires. (See *Coatsworth* v. *Johnson*; *Cresswell* v. *Davidson*.)

Special cases. As already stated, sect. 14 of the Conveyancing Act, 1881, does not enable the court to grant relief in respect of a breach of a covenant not to assign or underlet, or in respect of a breach of a covenant in a mining lease to allow the lessor to inspect the books, &c., and if a breach of such covenants occurs, even though it may happen by mistake (see *Barrow* v. *Isaacs*), no relief can be afforded to the tenant if the landlord thinks fit to eject him under the condition of entry. Further, as already stated, this section does not apply where a lease is forfeited by reason of the bankruptcy of the tenant, or by reason of his interest in the lease being taken in execution; but this is now subject to sect. 2 of the Conveyancing Act, 1892, by virtue of which a limited power of granting relief in respect of such forfeiture is conferred upon the court; but the section of the 1892 Act does not apply to leases of (1) agricultural or pastoral land; or (2) mines or minerals; (3) a house used or intended to be used as a public-house or beershop; or (4) a house let as a dwelling-house with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures; or (5) any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the nature or character of the property, or on the ground of neighbourhood to the lessor or to any persons holding under him. So that for any of these leases it is still impossible for the court to grant relief in respect to forfeiture arising from the bankruptcy of or execution against the tenant. In other leases relief in respect of such forfeiture can be given provided the lessee's interest is sold within a year of the forfeiture, at least this seems to be the effect of the section, which is clumsily worded, and runs thus:—Sub-sect. 6 of sect. 14 of the Conveyancing Act, 1881 (the sub-section which enacts that sect. 14 of the 1881 Act is not to apply to covenants not to assign, &c., or to covenants in mining leases allowing the lessor to inspect, &c., or a condition whereby the lease is forfeited on bankruptcy or execution), is to apply to a condition for forfeiture on bankruptcy of the lessee, or the taking in execution of the lessee's interest only after the expiration of one year from the date of

the bankruptcy or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year sub-sect. 6 shall cease to be applicable thereto.

Lessee's right of applying to the court for relief against forfeiture.

But not only does the act prevent a landlord from making a harsh use of his power to re-enter and his right to take advantage of a forfeiture, but when the lessor has, by complying with the previous provisions of the act, entitled himself to enforce these rights, and is actually proceeding so to do, but not after he has done so (*Rogers* v. *Rice*), the lessee may apply to the court for relief, even at the last hour, and the court may grant or refuse relief, and on such terms as it may think fit. The application for relief should be made in the action (whether in the High Court or county court) brought to enforce the forfeiture, but if no such action is pending the lessee must apply by action (and not by originating summons) to the High Court; he cannot in such a case seek relief in the county court. (*Locke* v. *Pearse.*) For the purposes of the section a lease includes (*inter alia*) an underlease; lessee includes underlessee, and a lessee's heirs, executors, administrators, or assigns. (See sect. 14, sub-s. 3.) An underlessee, as distinguished from the assignee of a lessee, was not, however, entitled to the benefit of the act as against the superior landlord; for it was said that there is no privity between the superior landlord and the underlessee, and the act was not intended to create privity where there was none before. (*Burt* v. *Gray; Cresswell* v. *Davidson.*) But this is now altered by sect. 4 of the Conveyancing Act, 1892, by which an underlessee can in such a case apply for relief, and the court can, if it thinks proper, grant relief to an underlessee, but only by making an order that the forfeited lease shall be vested in the underlessee, but for a term not exceeding that of the underlease, and on such terms, &c. as the court may order, one of which will be the payment of any legal or surveyor's costs incurred in connection with the notice served on the lessee. (See sect. 2 of the Conveyancing Act, 1892; and *Nind* v. *The Nineteenth Century Building Society.*) Further, a tenant under an agreement for a lease could not, under the Act of 1881, if he broke the terms of the agreement, obtain relief for the forfeiture consequent thereon, unless the circumstances

are very special (see *Swain* v. *Ayres and Luck*), that is, unless the agreement be such as the court would specifically enforce (*Strong* v. *Stringer*); but this is also now altered by sect. 5 of the Act of 1892, by which relief can be afforded to a tenant holding under an agreement for a lease or for an underlease, provided he has "become entitled to have his lease or underlease granted." What this exactly means is not quite clear, but probably its effect is to enable all tenants under agreements for leases to get relief from forfeiture, provided there is no condition to the granting of the lease still unfulfilled. Lessor also includes an under-lessor, his heirs, executors, administrators, or assigns; and even though the right of re-entry or forfeiture accrues under some stipulation inserted in pursuance of some act of parliament, notice of the breach, &c. must be given as required by this section. The section expressly enacts that nothing is to affect the law of re-entry or relief in case of non-payment of rent. (And see *Cresswell* v. *Davidson*.) The law was, and still is, that equity (and by statute law the common law courts) will relieve against the forfeiture for non-payment of the rent on the lessee showing equitable grounds, applying before the landlord has re-let the premises, and paying what is due, with costs; so that the forfeiture accrues at once, and no notice to the lessee, under the Conveyancing Act, is required, but the lessee will, in a proper case, obtain relief on paying the rent, interest, and costs within the time limited by statute law, that is, within six months of ejectment. (See 4 Geo. 2, c. 28, and 15 & 16 Vict. c. 76.) If an underlessee who has lost the benefit of his underlease, by reason of the underlessor not paying his rent, applies for relief, the court cannot assist him unless the original lessee is made a party to the action, and so is brought before the court. (*Hare* v. *Elms*.)

Covenants, &c., are incidental to the reversion.

By sect. 10 of the act, the benefit of the lessee's covenants, and the rent reserved by a lease, and the condition of re-entry, or other conditions, is incident to the reversion, even if severed, and may be taken advantage of by any of the persons entitled to the land subject to the term. The effect of this is to give the beneficial owner of the rent or income the right to sue as well as the legal reversioner. Formerly at common law the only person who could take advantage of a proviso for re-entry was the person who granted the lease or his heirs. By 32 Hen. 8, c. 34,

grantees of the reversion were enabled to take advantage of the proviso, and the privilege was extended to the assignees of each part of a severed reversion by 22 & 23 Vict. c. 35, s. 3.

By sect. 11 of the act, the obligation of a covenant entered into by the lessor is made incident to the reversion, and, notwithstanding the severance of the reversion, the person entitled to the benefit of the covenant may sue on it. But this only applies to covenants by which the lessor has power to bind the reversionary estate.

In conclusion, we may mention that there is no statutory form of a lease given by the Conveyancing Act, 1881.

III. Some Miscellaneous matters.

The effect of Waiving a Right to Re-enter.

The old law.

We must now say a few words as to the effect of the waiver of the right to re-enter or of the forfeiture caused by a breach of covenant. The old law, as established by *Dumpor's case*, was, that every condition was one and entire and incapable of being divided, so that if a condition was once waived it was gone for ever. This, however, only extended to express waivers; for a waiver implied from the receipt of rent, after and with knowledge of a breach, did not operate to debar the lessor from taking advantage of the condition on a breach occurring after waiver. The rule was the same with regard to licences granted by the lessor to commit a breach of a covenant secured by a right of re-entry or a clause of forfeiture. But by 22 & 23 Vict. c. 35, it was provided that in such cases the licence granted should extend to the permission actually given, or to the specific breach of covenant authorized to be committed, and not operate to prevent proceedings for a subsequent unlicensed breach; and a provision was also made that where a licence was given to one of several lessees to commit a breach of such a covenant, or to one lessee in respect to part only of the property, the licence was not to operate to destroy the right of re-entry in case of a breach by the co-lessees, or by the lessees of the rest of the property. And by 23 & 24 Vict. c. 38, it was enacted that where an actual

The present law.

waiver of the benefit of any covenant or condition had been made by the lessor, it was not to extend to any instance other than that to which it specially related, or to be deemed a general waiver of the benefit of such covenant or condition, unless an intention to that effect appeared.

Acts which constitute waiver.

A breach is impliedly waived if the lessor, having knowledge of it, does any act from which it may be presumed that he recognizes the tenancy as still subsisting—*e. g.*, by accepting rent due *after* (but not *before*) the forfeiture was incurred (*Price* v. *Wormwood*; *Marsh* v. *Curteys*); by distraining for rent due either before or after forfeiture incurred (*Cotesworth* v. *Spokes*; *Doe* v. *Peck*; and see *Kirkland* v. *Briancourt*); by evicting the tenant (*Pellatt* v. *Boozey*). Sometimes acceptance of rent will amount not only to a waiver of a past breach, but also to a licence to continue the breach in future. Thus, if a covenant not to underlet is broken, and the landlord, with knowledge of the breach, goes on receiving rent, he waives the right to re-enter for the whole time during which the sub-interest lasts. (See *Doe* v. *Bliss*; *Griffin* v. *Tomkins*; *Lawrie* v. *Lees*.)

A landlord's common-law right of re-entry on the expiration of the lease is not suspended by his obtaining an ejectment order against the tenant, under 1 & 2 Vict. c. 74. (*Jones* v. *Foley*.)

While a waiver may destroy a right of entry for breach of covenant, it does not release a right of action for such breach.

The Surrender of Leases.

When a deed is necessary.

Leases may be determined in several ways, and, *inter alia*, by surrender, which may be express, in which case it must be by deed (8 & 9 Vict. c. 106), unless it is of a copyhold interest, or of an interest which might have been created without writing—*e. g.*, a lease for not more than three years, at two-thirds at least of a rack-rent; for of such a lease, while the Statute of Frauds requires the surrender to be in writing, 8 & 9 Vict. c. 106 does not require it to be by deed; or the surrender may take place impliedly by the operation of law. A surrender is implied when the one party does, and the other assents to, an act inconsistent with the continuance of the lease. Mere cancellation of the lease does not operate as a surrender. (*Roe* v. *Arch-*

When a surrender arises by implication.

bishop of York.) But if the lessor, with the assent of the lessee during the continuance of the term, grant a new lease either to the tenant himself, or to him jointly with a third person, or to a third person alone, in all these cases the result is that the old lease is deemed to be surrendered. (See *Lyon* v. *Reed; Hammerton* v. *Stead*, and *Davison* v. *Grant.*) The surrender will occur even if the old lease was by deed and the new one is by parol only. (*Dodd* v. *Acklom.*) But the giving up of a small portion of the premises, in consideration of a proportionate reduction of the rent, does not of itself amount to a surrender by the operation of law. (*Holme* v. *Brunskill.*)

Other acts which amount to surrender by operation of law.

There are also other acts which will amount to a surrender by the operation of law. Thus, anything which amounts to abandonment of possession by the tenant, if there is evidence to show that the landlord assented thereto, will constitute such a surrender; *e.g.*, where the tenant left the premises and wrote to the landlord that he might re-let the premises, and the landlord immediately did so, it was held that there was here a surrender by the operation of law. (*Nicholls* v. *Atherstone;* and see *Walls* v. *Atcheson*, where no request was made by the tenant to re-let.) Again, delivery to and acceptance of the key of the premises, either on a parol agreement that the tenancy shall cease, or under circumstances from which the intention of the lessor to resume possession can be inferred, will have a similar effect. (See *Moss* v. *James.*) But in all cases there must be something to show the assent of the landlord to the quitting of possession. If the key be merely left with the landlord, the landlord is not bound to return it, and if he does not do so it will not be presumed therefrom that he has assented to the quitting of possession. (*Cannan* v. *Hartley;* and see *Bessel* v. *Landsberg.*) Nor will a mere attempt by the landlord to re-let the premises estop the landlord from alleging that the tenancy is still subsisting, and when there is a re-letting the surrender only takes effect as from the date thereof. (*Oastler* v. *Henderson.*) A surrender will not be allowed to act prejudicially on the rights of third parties, so that it will not avoid or prejudice an underlease. (See *G. W. Rail. Co.* v. *Smith.*) The surrender of a lease does not extinguish the right to sue for a breach of covenant in the lease committed before the surrender. (*Raikes* v. *Summers.*)

Finally, you must bear in mind that a surrender cannot be validly made until the lessee has entered; since a mere *interesse termini* will not support a surrender. (*Wallis* v. *Hands & Co.*)

Another method of determining a tenancy is by notice to quit.

Notices to Quit.

Length of notice to quit depends on contract.

Notice to quit applies most especially to tenancies from year to year, and attaches to them without any special stipulation; and, indeed, any stipulation to deprive either party of the right to determine the tenancy by such a notice is void as being repugnant to the nature of a tenancy from year to year. (*Wood* v. *Beard.*) But the parties may contract for any length of notice, or that the tenant may quit without notice, or that the notice may expire at any period of the year, and generally may vary the requisites of the notice as required by the law. If no stipulations are made, the notice, which may be a verbal one, must be a half-year's notice given half-a-year at least before the expiration of some year of the tenancy. But if the tenancy commenced on some one of the usual quarter days, the notice must be given before the last quarter day but one before the quarter day on which the current year of the tenancy expires, and this will be a good notice, though it be less than the full period of 182 days or half-year required by law. (See *Roe* v. *Dorrant.*) In the case of a weekly tenancy, a week's notice, or at least a reasonable notice (*Jones* v. *Mills*), and in the case of a monthly tenancy, a month's notice, is required. Special provisions are made by the Agricultural Holdings Act, 1883, as to notice to quit. (*Vide post*, p. 377.)

When the notice must expire.

The notice must expire at that period of the year when the tenancy commenced. A doubt as to when the tenancy must be considered as having commenced is a question for a jury to settle. (*Doe* v. *Howard.*) If the tenant enters in the middle of a quarter and pays rent for the half-quarter, and then goes on paying rent from quarter to quarter, or if he gets the half-quarter rent-free, the tenancy will, for the purposes of giving notice to quit, be deemed to have commenced on the quarter day next after he entered. (*Doe* v. *Stapleton.*)

Notice as to part is, as a rule, bad.

The notice must be given to quit the whole of the premises; a notice to quit part is void, unless

it is given under the Agricultural Holdings Act, 1883. (See *post*, p. 377.) If the day on which it is intended to quit is specifically mentioned, care should be taken that it is the right day, for if it is not, the notice will be invalid. (*Doe* v. *Lea.*) But a notice for two alternative days is good if either of them be the right one. (*Doe* v. *Wrightman.*) A notice to quit "on or before" a specified date is equivocal and bad. (*Gardner* v. *Ingram.*) But the best form of notice is one which does not specify the day by name, but states the intention of quitting "at the expiration of the current year of the tenancy which shall expire next after the end of one half-year from the date hereof." The notice must be imperative, and no conditions must be imported into it; thus, a notice to the tenant that he is to quit or agree to pay double rent is bad; but it has been held that a notice which ran, "I desire you to quit or I shall insist on double rent," was good, as it did not offer an alternative; and unless the tenant quitted on such a notice, the law would imply an agreement on his part to pay the double rent. (*Doe* v. *Jackson.*) Notice should be given to the lessor or his agent for receiving rent and letting the property. It may, *inter alia*, be served through the post; and in one case where this was done, and the letter reached the address during business hours on the last day for giving notice, but the landlord's agent had left and did not receive it till next day, the notice was held to be in time. (*Pappillon* v. *Brunton.*) The notice may be withdrawn by consent, or it may be waived, expressly or impliedly, as by the landlord distraining for rent or receiving rent after the expiration of the notice. But it would not seem to be a waiver merely to demand the subsequent rent without receiving it. (*Blyth* v. *Dennett.*) And a mere indulgence to the tenant, as allowing the tenant for convenience sake to remain on the premises after the expiration of the tenancy, will not amount to a waiver. (*Whiteacre* v. *Symmons.*)

Best form of notice.

How served.

Notice may be withdrawn.

Rights of the Parties on the Expiration of the Term.

The Tenant's Right to remove Fixtures.

The rule is, that if a tenant affixes any chattel to the soil it becomes the property of the landlord on the termination of

What are tenant's fixtures.

the tenancy. But there are certain fixtures, known as "tenant's fixtures," which by virtue of custom or by the common or statute law he is entitled to remove. These fixtures generally fall under the three heads of trade fixtures, fixtures set up for ornament, convenience, or domestic use, and agricultural fixtures. Thus, though a nurseryman may remove trees planted by him for the purposes of his trade (*Lee* v. *Risdon*), a private person may not remove trees, or even flowers, planted by him. (See *Wyndham* v. *Way*.) The following have been held to be removable trade fixtures:—vats set up by a soap boiler (*Poole's Case*); a fire engine set up by a colliery proprietor (*Lawton* v. *Lawton*); salt pans set up by the owner of salt works (*Lawton* v. *Salmon*); an engine screwed to planks, used for trade purposes (*Climie* v. *Wood*); hot-houses erected by a nurseryman. (*Penton* v. *Robart*.) Tenant's fixtures of an ornamental, &c. description can only be removed when the removal can be effected without damage, not only to the premises, but to the chattel itself; and they will not be removable if they constitute not merely ornaments, but become virtually an essential part of the building itself. Thus, panels, though easily removable without creating injury, were held not to be removable fixtures on this ground. (See *D'Eyncourt* v. *Gregory*.) The following are a few of the fixtures which have been held to be removable under this head:—bells (*Lyde* v. *Russel*); cornices (*Avery* v. *Cheslyn*); bookcases nailed or screwed to the wall (*Birch* v. *Dawson*); ornamental chimney-pieces (*Leach* v. *Thomas*); a pump slightly affixed to the freehold (*Grymes* v. *Boweren*); marble slabs (*Allen* v. *Allen*); grates, ranges, or stoves fixed with brickwork in the chimney-places, but removable without injury. (*R.* v. *St. Dunstan*.) As to agricultural fixtures, we shall speak later on when considering the Agricultural Holdings Act of 1883. But we may state here that it was held, in the leading case of *Elwes* v. *Maw*, that the rule as to the removability of trade fixtures did not extend so as to allow fixtures set up for agricultural purposes to be removed.

Illustrations.

Time for removal.

The removal must only be effected during the continuance of the tenancy, or at least before the tenant quits possession, and before the landlord has the right to consider him a trespasser. (*Heap* v. *Barton*; *Pugh* v. *Arton*.)

Emblements.

When the term is liable to come to a sudden determination, and one which cannot be foreseen by the tenant, as where he is a lessee at will, or to a tenant for life, or his tenancy is otherwise liable to be put to a sudden end by the landlord, the tenant has a right to emblements. This is, however, a right which he will not have if the term be put an end to by his own act. Emblements consist of all crops produced annually by the labour of the cultivator; that is, they do not consist of such crops as are produced spontaneously, or which require more than a year to arrive at maturity. Thus, corn, turnips, carrots, potatoes, and the like, are emblements; and so are hops, though they spring from old roots, for they are annually manured. But clover is apparently not an emblement, for it takes more than a year to reach maturity. The tenant, then, has the right, should his term come suddenly to an end by some other cause than his own act (but not otherwise, unless by virtue of some local custom) while these crops are planted, and before they have yet come to maturity, to enter on the land, in spite of the determination of the tenancy, and to reap and carry away the harvest of what he has sown. By 14 & 15 Vict. c. 25, s. 1, it is enacted, with regard to under-tenancies, determinable with death of lessor or other uncertain event, if they are held at a rack-rent, that the under-tenant, on his landlord's interest in the property suddenly determining, instead of his claim to emblements, shall continue to hold on till the expiration of the then current year of his tenancy, and shall then quit on the terms of his lease, in the same manner as if it were then determined by effluxion of time or other lawful means during the continuance of the landlord's estate; and the succeeding landlord or owner may recover a fair proportion of rent for the period which may have elapsed from the death or cesser of the estate of the preceding lessor to the time the tenant so quits; and the tenant and the succeeding landlord, as between themselves, and as against each other, shall have all the benefits and be subject to all the terms and conditions to which the preceding landlord and tenant respectively would have been so entitled or subject in case the lease had determined in such manner; and

When the right to emblements arises.

What are emblements.

Statutory provisions as to.

no notice to quit will be necessary or required to determine the tenancy.

Some Special Provisions relating to Agricultural and Pastoral Holdings and Holdings cultivated as Market Gardens.

Present law regulated by the Agricultural Holdings Act, 1883.

With regard to agricultural holdings, the ordinary law as to fixtures and notice to quit is in some measure put on a different footing by the Agricultural Holdings Act, 1883, and this act also makes some important provisions as to compensation for improvements made by the tenant of such holdings. The act repeals the previous Act of 1875 and the amending Act of 1876; but in the main repeats its provisions in an amended form.

To what holdings the act applies.

The act does not apply to holdings not agricultural or pastoral in whole, or not in part agricultural and as to the residue pastoral, or not in whole or in part cultivated as a market garden; nor does it apply to any holding let to the tenant during his continuance in any office, appointment, or employment held under the landlord. There is no express provision, as there was under the Act of 1875, that the holding be of two acres at least. But since the Allotments and Cottage Gardens Compensation Act, 1887 (50 & 51 Vict. c. 26), has somewhat similar provisions to this statute, but only applies to allotments of not more than two acres, there would seem a *primâ facie* inference that holdings of such small acreage are not within the Agricultural Holdings Act, 1883.

As to compensation for improvements.

The first part of the act relates to compensation for improvements made by the tenant. The improvements for which compensation is allowed are of three kinds:—(1) Improvements of a permanent nature, such as erecting buildings or laying down permanent pasture: for these the tenant only obtains compensation if they are effected with the landlord's written consent. (2) Improvements effected by drainage: for these compensation is only allowed provided due notice was given to the landlord, and he did not, as he may under the act, execute the improvements mentioned in the notice. If the landlord chooses to incur the outlay himself, provisions are contained in the act whereby the tenant pays interest on the money expended.

(3) Improvements of a less important character, such as chalking of land, clay burning, consumption in the holding by cattle of cake, &c.: for these improvements, unless some reasonable compensation is substituted, the tenant is entitled to compensation, although effected without any notification to or consent of the landlord. Provisions are also made as to the manner in which the amount of compensation is to be estimated.

As to the notice to quit.

The same part of the act also deals with the subject of notice to quit; sect. 33 providing that where half a year's notice expiring with the year of tenancy is by law necessary and sufficient for the determination of a tenancy from year to year, a year's notice shall be necessary and sufficient to determine an agricultural or pastoral tenancy, unless the parties agree in writing that the section shall not apply, when the ordinary half-year's notice will be necessary and sufficient. This section will not apply to a yearly tenancy where the parties have expressly agreed as to the notice required, whether the notice agreed upon is a six months', half a year's, or any other kind of notice; that is, the section only applies where the parties have made no agreement as to notice. (*Barlow* v. *Teal.*) And by sect. 41 the landlord may give his tenant notice to quit part of the lands demised, if he requires that part for any of the purposes set out in the act. The tenant can then, if he likes, within twenty-eight days of the service of the notice on him, give the landlord a counter-notice that he accepts the notice for the whole of the premises, and the notice will take effect accordingly. Failing this counter-notice by the tenant, he must give up the portion referred to, whereupon he can claim the compensation as to improvements in that portion under the act, and his rent will be reduced in proportion to the amount of land given up.

As to removing agricultural fixtures.

Provision is also made as to agricultural fixtures, in the main almost identical with those contained in the Act of 1875. A tenant may remove any engine, machinery, fencing, or other fixture or building erected by him for which no compensation is given by the act; but before removal he must give the landlord a month's notice of his intention to remove, and the landlord may prevent the removal by purchasing the engine, &c. at a sum agreed upon by the parties or fixed by valuation. Damage done in removing must be made good by the tenant, and he cannot

remove unless he has paid all rent and satisfied all obligations. The removal must be made during the continuance of the tenancy, or within a reasonable time after the determination thereof. There is no restriction, as there was in the Act of 1875, as to the removal of steam engines.

As to the landlord's right of distress.

The second part of the statute deals with the law of distress, and puts some very desirable limits on it. By sect. 44, the landlord can only distrain for one year's arrears of rent instead of, as hitherto, for six years' arrears. Where the rent is not, by the ordinary course of dealing, payable until a quarter or half-year after legally due, it is not deemed, for the purposes of distress under the act, due until actually payable. And by sect. 45, a landlord cannot distrain cattle belonging to a third person, and being agisted by the tenant, when there is other sufficient distress; and even where there is no other sufficient distress, he can only distrain such cattle for a sum not exceeding the amount due to the tenant for the feeding. (See *London and Yorkshire Bank* v. *Belton.*) And further, agricultural and other machinery belonging to a third person, and on the demised premises *bonâ fide* for hire or use, or on the demised premises for the purposes of the tenant's business, and live stock *bonâ fide* belonging to a third person, and on the land for breeding purposes, are absolutely privileged from distress. Again, by sect. 47, any compensation due to the tenant under the act, or by custom or contract, may be set off against the sum distrained for: and by sect. 49 provision was made for keeping down the expenses of distress for 20*l.* or upwards. In the management of the distress, too, the act provided (sect. 50), that the goods seized need not, as required by 2 Will. & M. c. 5, s. 1, be appraised before sale, but the tenant has the right to demand in writing that the sale shall take place by public auction; and by sect. 51, the period of five days fixed by the above statute to elapse before the sale of any goods seized under a distress, so as to enable the tenant to replevy, might be extended to fifteen if the tenant made a request to that effect in writing, giving security for any additional costs which may be incurred. And by sect. 52, certified bailiffs were to be employed, authorized by writing under the hand of a county court judge. (See *Saunders* v. *Saunders.*) These sections, 49, 50, 51, and 52, are

Chattels privileged.

Compensation may be set off.

Mode of levying distress.

now repealed, but the provisions thereof re-enacted and extended to all tenancies by the Distress Amendment Act, 1888, and rules thereunder. Some miscellaneous provisions are made by Part 3 of the act. By sect. 55, agreements as to compensation for improvements inconsistent with the act are void, but the provisions of the act on the subject may be excluded if reasonable compensation be afforded to the tenant by the lease itself. By sect. 56, if an incoming tenant, with the landlord's consent, pays an outgoing tenant for compensation payable under the act, he will be entitled to such compensation when he quits as the former tenant, had he remained such, would have been entitled to. By sect. 59, with some few exceptions, no compensation under the act is allowed for improvements made by the tenant within a year previous to his quitting.

Agreements as to compensation.

Again, by the Allotments and Cottage Gardens Compensation for Crops Act, 1887, which came into force on 1st January, 1888, benefits similar to those conferred by the Agricultural Holdings Acts were extended to holders of allotments, *i. e.*, any parcel of land of not more than two acres in extent held by a tenant under a landlord, and cultivated as a garden or as a farm, or partly as a garden and partly as a farm. By this act, on the determination of the tenancy, the tenant, notwithstanding any agreement to the contrary, may obtain compensation—(a) for crops and fruit growing on the land, and fruit trees planted with the landlord's previous consent in writing; (b) for labour expended on, and manure applied to, the land since the taking of the last crop therefrom in anticipation of a future crop; (c) for drains, and for any out-buildings, pigsties, fowl-houses, or other structures made by the tenant with the landlord's consent in writing. In ascertaining the amount of compensation the landlord may set off arrears of rent due from the tenant, or damage for breach of the contract of the tenancy, or for wilful or negligent damage committed by the tenant. The amount of compensation may be agreed on between the parties, and if they do not agree is to be settled by arbitration, to be carried out under the provisions of the act.

Cottage Gardens Compensation Act, 1887.

Previously to the Tenants' Compensation Act, 1890, when a tenant of lands had been ejected by a mortgagee, the claim which he would have had for compensation for improvements,

Tenants' Compensation Act, 1890.

&c. (at the expiration of his tenancy under the Agricultural Holdings Act, 1883, or the Cottage Gardens Compensation Act, 1887), against the landlord, the mortgagor, was not enforceable against the mortgagee taking possession. This has been found to operate injuriously in many cases, since it often happens that a mortgagor, without any power to do so, leases his lands, and the tenant is liable to ejectment by the mortgagee. (*Keech* v. *Hall.*)

The act provides that where a person occupies land under a contract of tenancy with the mortgagor, whether made before or after the passing of this act, which is not binding on the mortgagee of such land, then—

(1) The occupier shall, as against the mortgagee who takes possession, be entitled to any compensation which is, or would but for the mortgagee taking possession be, due to the occupier from the mortgagor as respects crops, improvements, tillages, or other matters connected with the land, whether under the principal acts or the custom of the country, or agreements sanctioned by the principal acts;

Provided that any sum ascertained to be due to the occupier for such compensation, or for any costs connected therewith, may be set off against any rent or other sum due from him in respect of the land, and recovered as compensation under the principal acts, but unless so set off shall, as against the mortgagee, be charged and recovered in accordance only with sect. 31 of the Agricultural Holdings Act, 1883, as if the mortgagee were the landlord within the meaning of that section.

(2) Before the mortgagee deprives the occupier of possession of the land otherwise than in accordance with the said contract, he shall give to the occupier six months' notice in writing of his intention so to deprive him, and if he so deprives him, compensation shall be due to the occupier for his crops, and for any expenditure upon the land which he has made in the expectation of holding the land for the full term of his contract of tenancy, in so far as any improvement resulting therefrom is not exhausted at the time of his being so deprived, and such compensation shall be determined in like manner as compensation under the principal acts, and shall be set off, charged, and recovered in manner before provided in this section. This sub-section shall

only apply where the said contract is for a tenancy from year to year, or for a term of years not exceeding twenty-one at a rack-rent.

The act applies to all tenancies within the Acts of 1883 and 1887, referred to in sect. 1, whether made before or after 18th August, 1890, not binding on the mortgagee, that is, made after the mortgage without the consent of the mortgagee, and in the absence of any power on the part of the mortgagor to grant leases. (See *Keech* v. *Hall*, *Moss* v. *Gallimore*, and sect. 18 of the Conveyancing Act, 1881.) Before the mortgagee can take possession of lands held under a yearly tenancy, or a tenancy for years not exceeding twenty-one, held at a rack-rent, he must—unless the contract of tenancy otherwise provides—give the tenant six months' written notice of his intention to take possession. To what tenancies applicable.

The act further provides that where compensation for improvements comprised in Part 1 or Part 2 of the first schedule to the Agricultural Holdings (England) Act, 1883, is charged by an order under sect. 31 of that act, the charge shall be a land charge within the meaning of the Land Charges Registration and Searches Act, 1888, and shall be registered accordingly.

The Provisions of the Ground Game Act, 1880.

In connection with leases of land, as distinguished from leases of house property, it will be useful for you to be well acquainted with the provisions of the Ground Game Act, 1880, as your advice may be sought on points arising under that statute. This act, which came into force in September, 1880, provides that the occupier of land shall have, as incident to and inseparable from his occupation, the right to kill and sell ground game —that is, hares and rabbits—thereon, concurrently with any other person who may be entitled to kill and take such game: every agreement, condition, or arrangement which purports to divest or alienate this right, or gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void. But the right is subject to the following limitations:—

(1) The occupier shall kill and take ground game only by

himself or by persons duly authorized by him in writing; and he and one other person, authorized in writing by him, shall be the only persons entitled to kill ground game with firearms; and no person shall be authorized by him except members of his household resident on the land, persons in his ordinary service on such land, and any one other person *bonâ fide* employed by him for reward in the taking and destruction of ground game; and every person so authorized, on demand by any person having a concurrent right to kill the ground game, or any person authorized by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorized, and in default he shall not be deemed to be an authorized person.

(2) A person shall not be deemed to be an occupier of land by reason of his having a right of common over such lands; or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle or horses, for not more than nine months.

(3) In the case of moorlands and uninclosed lands (not being arable lands), the occupier and the persons authorized by him shall exercise the rights conferred only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent.

This act does not apply to cases in which, *at passing*, the right of taking game is for valuable consideration vested in some person other than the occupier. Thus, it does not apply to a lease which takes effect after, but which is made in pursuance of an agreement made before the act came into operation. (*Allhausen* v. *Brooking*.) No person, under this act or otherwise—but this does not include the owner of the property, but only the occupier (*Smith* v. *Hunt*)—shall, under a penalty, use any firearms for the purpose of killing ground game between

the expiration of the first hour after sunset and the commencement of the last hour before sunrise; nor shall he employ spring traps, except in rabbit holes, nor employ poison.

The Liabilities incurred by a Tenant who holds over.

Landlord's rights if tenant declines to quit

There is an implied undertaking on a demise of any premises that the tenant will deliver up possession at the expiration of his tenancy (*Henderson* v. *Squire*), and the landlord may assert his right to possession by entry, and may expel the tenant, and he does not waive his right to enter by obtaining an ejectment order under 1 & 2 Vict. c. 74. (*Jones* v. *Foley*.) He may assert his right of re-entry by peaceably taking possession, and, if the premises are vacant, he may break open a door to obtain possession. (*Turner* v. *Meymott*.) But if the tenant is still in possession, he should not attempt to use force till he has first requested him to go, and even then he must only use so much force as is sufficient to overcome his resistance. But the safest course is to take legal proceedings in ejectment. By 4 Geo. 2, c. 28, it is provided that if a tenant for years wilfully holds over after the expiration of the term, and after demand made and notice in writing given for delivering the possession thereof by the lessor, he will, so long as he keeps the lessor out of possession, be liable to pay rent at the rate of double the yearly value of the land. This act does not apply to tenants who are not at least tenants from year to year, and therefore has no application to weekly tenancies (see *Lloyd* v. *Rosbee*); and further, it only applies when the holding over is strictly wilful and contumacious. (*Wright* v. *Smith*.) The demand and notice in writing is sufficiently made in the case of a tenancy from year to year by the ordinary written notice to quit, without any further demand. (*Hirst* v. *Horn*.) The double value when it has become payable is not, strictly speaking, rent; so it cannot be distrained for (*Timmins* v. *Rawlinson*); and as it is a penalty, an action to recover it must be brought within two years, under 3 & 4 Will. 4, c. 42.

When entitled to double annual value.

And when to double rent.

By 11 Geo. 2, c. 19, s. 18, it is enacted that if a tenant gives notice to quit, and then holds over, he will thenceforward have to pay *double the rent* he would otherwise have had to pay. In this case the double rent can be recovered by distress, and

the notice to quit need not have been in writing. This statute seems to apply to *any* tenancy, even to one created by mere parol, where a tenant has power to determine by notice (see *Johnstone* v. *Hudlestone*), though in *Sullivan* v. *Bishop* it was held not to apply to weekly tenancies, but this case would appear to be no longer law. (See Bullen on Distress, p. 116.)

Stamps.

The stamp duty on leases, whatever their length, and on agreements for leases, when the term does not exceed thirty-five years, depends on the rent, and a reference on each occasion should be made to the table in the Stamp Act, 1891. Agreements for leases for over thirty-five years require a sixpenny agreement stamp only.

Where there is first an agreement for a lease duly stamped as a lease, and subsequently a lease is executed, the lease requires a sixpenny stamp only.

The stamps on leases must be impressed, with the exceptions of (1) leases of a dwelling-house or part thereof for a term not exceeding a year, and a rent not exceeding 10*l.* a year; and (2) leases of any furnished apartments or dwelling-house for a term less than a year. In these two cases an adhesive stamp may be used. (See sect. 78, Stamp Act, 1891.)

Where a lease gives to the lessee the option to buy the freehold, no extra stamp duty is required (*Worthington* v. *Crumpton*); nor is any extra duty necessary by reason of there being a covenant by a surety to pay the rent. But a lease containing a contract for the sale of fixtures is liable, in addition to the lease stamp, to a sixpenny agreement stamp, if not under seal, and a ten shilling stamp if by deed. (*Corder* v. *Drakeford.*)

Where in one lease several parcels are let to the same person, the stamp duty is on the aggregate amount of the rents (*Boase* v. *Jackson*); but if a lease of several parcels is made to different persons, the lease is liable to an *ad valorem* duty on the separate rents. (*Doe* d. *Copley* v. *Day.*)

Legal Charges.

As already mentioned, in the absence of agreement, the lessee is liable to pay all the legal charges and expenses connected with the lease. These charges are now (unless otherwise arranged) regulated by Schedule I. of the Solicitors' Remuneration Order, 1881, and vary with the amount of the rent reserved, and not on the amount of the work done. You will find the scale of charges set out *post*, Part VIII., and you will observe that the lessee's solicitor obtains one-half the amount payable to the lessor's solicitor, and that if an abstract is delivered, then an extra charge is allowed to the lessor's solicitor in accordance with its length, &c., and that, if you act for both lessor and lessee, you will be entitled to charge the lessor's solicitor's charges, and one-half that of the lessee's solicitor.

It has been decided that where there is first an agreement for a lease, and then a lease follows, that the solicitors engaged can only charge the scale fees, just as if there had been no preliminary agreement. (*In re Emmanuel and Simmonds.*)

PART V.—SETTLEMENTS.

WE shall consider this subject under the following headings:—

I. The object of a marriage settlement, and the effect of the Married Women's Property Acts thereon.
II. Settlements of personal property.
III. Strict settlements.
IV. Voluntary settlements.
V. Some miscellaneous matters.

I. THE OBJECT OF A MARRIAGE SETTLEMENT, AND THE EFFECT OF THE MARRIED WOMEN'S PROPERTY ACTS THEREON.

M. W. P. Act, 1882, does not do away with the necessity for a settlement on marriage.

It must not be supposed that since the Married Women's Property Act, 1882, a marriage settlement is unnecessary, and that the act itself, more or less, answers the purpose for which a settlement was formerly made. For, though the position of a woman who marries after December, 1882, without any settlement being made upon the marriage, is now much more nearly akin to that of a woman who married with a settlement than it was before the passing of the act, yet settlements will still be of the greatest importance in the majority of cases, as many things are done by a settlement which are left entirely untouched by the act. Thus, the act removes the husband's marital rights, but it does not remove the marital control; and if it is wished that a woman shall hold her property so that her husband cannot induce her by "his kicks or his kisses" to dispose of it in his favour, it must still be settled on her expressly for her separate use with restraint upon anticipation. (*Stogden* v. *Lee.*) So, too, the act makes no provision for the husband, who, under

the usual form of settlement, generally gets a life interest in his wife's property after her death, and so to protect the husband a settlement is still necessary. Again, settlements make provision for the children, which is not done by the act. And trustees are interposed by a settlement—there are none given by the act. The result is, that settlements will still be in general use, and when they are used they may abridge, control, or enlarge the statutory rights of the woman.

Position of a married woman as to her property under the Act of 1870;

In order properly to understand the objects which a settlement is intended to effect, so far as the protection of the wife's property against the husband is concerned, it will be advisable in the first place to consider the position of a married woman under the Acts of 1870 and of 1882; for though the former act is repealed by the latter, it will still regulate rights, &c. acquired before the 1st of January, 1883. By the Act of 1870, certain property, which formerly both at law and in equity passed to the husband, was given to the wife for her separate use, just as if it had been settled upon her, viz.—(1) All property earned by the exercise of her hands or brains after the 8th August, 1870, no matter when married, and the investments, &c. of such earnings; (2) if married on or after the 9th of August, 1870, the rents and profits of all real property (but not the corpus: *Johnson* v. *Johnson*), and the absolute interest in all personal property, coming to her under an intestacy; (3) if married on or after the 9th of August, 1870, sums of money given to her by deed or will not exceeding 200*l*. These provisions were of a tentative character only, and scarcely affected the rights of husbands married before the act came into operation, and only partially the rights of those married after that date; for if real property, or any sum exceeding 200*l*., was given by deed or will to a woman married after the 9th August, 1870, and was not stated to be for her separate use, the property vested in the husband just as before the act, subject to the wife's equity to a settlement, if the husband could not get possession of it without the aid of the Court of Chancery. But now, by the Married Women's Property Act, 1882, every woman married since the 31st December, 1882, is entitled to hold as her separate property, and to dispose of by will or otherwise, all property, whether real or personal, belonging to her at the time of the marriage, or acquired by,

and under the Act of 1882.

or devolving on, her afterwards; and every woman who was married before the 1st January, 1883, is entitled to hold as her separate property, and to dispose of by will or otherwise, all property, whether real or personal, her title to which, whether vested or contingent, and whether in possession, remainder, or reversion, accrues after that date. It has been decided that the act does not apply where her title in reversion accrued before January 1st, 1883, but does not fall into possession till after that date. The date to be looked at, where the woman was married before the act, is the date of her first becoming entitled to the property; the date when it falls into possession is immaterial. Thus, where a lady became entitled to reversionary property in 1881, and she married in 1881, and the reversion fell into possession in 1883, it was held that the property was not within the act, for sect. 5 of the act, relating to the rights of women married before 1883, only applies to property which accrues to a married woman *for the first time* after the commencement of the act, and in this case the title accrued before that time, though it did not fall into possession till after it. (*Reid* v. *Reid.*)

Act does not apply to reversionary interests to which her title accrued before the act.

Further, a married woman, whatever may be the date of her marriage, is, by the combined effect of the two acts, entitled for her separate use to any wages or earnings acquired or gained by her since the 9th of August, 1870, in any employment, trade, or occupation in which she is engaged, or which she carries on separately from her husband, and any money or property acquired by her by the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property.

Wages and earnings belong to her for her separate use.

Again, by the Act of 1882, a married woman may hold stock and shares in companies, annuities, public stock and funds, deposits in savings banks, shares in friendly, benefit, &c., societies, and the dividends are, in such case, to be paid to her on her own receipt. These stocks and shares, &c., can be transferred by the woman alone, and any liability attaching to them the separate estate of the woman alone is liable to make good. But nothing in the act requires or authorizes any corporation or joint stock company to admit any married woman to hold shares to which any liability may be incident, contrary to the provision

Stocks and shares may be held as separate estate.

of any act of parliament, charter, bye-law, articles of association or deed of settlement regulating such company. This provision is somewhat similar to the provision contained in the Act of 1870, but it is much wider in extent; for, under the earlier act, she was only allowed to hold shares, &c., to which no liability was attached. The act further makes provision for enabling a married woman to hold such securities jointly with a person or persons other than her husband, and for the transferring the same with that other or others without the concurrence of the husband.

Married woman may insure her own and her husband's life.

The act also provides that a married woman may effect a policy on her own life or the life of her husband for her separate use, and a policy effected by a man on his life, and expressed to be for the benefit of his wife and children, or for his wife or his children, or by a married woman on her life, and expressed to be for the benefit of her husband and children, or for the husband or the children, will create a trust in favour of the objects named, and the moneys payable under the policy are not to be liable to the debts of the assured. But creditors, if they can prove that the policy was effected and the premiums paid with intent to defraud them, are entitled to be paid a sum equal to the premiums so paid. A trustee to receive the policy moneys may be appointed (and the appointment of a new trustee is also provided for), and if no trustee be appointed, the policy vests in the assured or his personal representatives in trust for the above purposes. The receipt of the trustee, or of the legal personal representative where no trustee, or no notice of the appointment of a trustee is given to the assurance company, is a discharge to the company for the money secured by the policy, or for the value thereof, in whole or in part.

It was held in *Re Davies' Policy Trusts* that if a policy is effected by a husband for the benefit of his wife and children, on his death the wife and children take the policy money as joint tenants.

Married woman's contracts bind present and future property.

While the act thus confers extensive rights on a married woman, it also takes care to impose on her corresponding liabilities, and also to provide for the protection of her husband and her creditors. Thus, her contracts now, whether she has any separate estate at the date of the contract or not (see M. W. P. Act, 1893, s. 1, overruling *Palliser* v. *Gurney*; *Deakin* v. *Lakin*, and other cases), bind her separate estate free from restraint, whether

that estate is owned by her at the time of the contract or is acquired subsequently, unless a contrary intention be shown. Further, she is made liable to be sued both in contract and in tort as if she were a *feme sole*, without the necessity (although in an action of tort he *may* be joined, and the damages awarded may be recovered from him: *Seroka* v. *Kattenburg*) of joining her husband as co-defendant, and damages or costs recovered against her will be payable out of her separate property.

And she may be made bankrupt if trading.

Besides being available to her creditors by means of an action, in future the separate estate of a married woman, who carries on business apart from her husband (see *Re Gardiner*, *Ex parte Coulson*, *In re Helsby*), will be available to them under bankruptcy proceedings, though a bankruptcy notice cannot, with a view of making her commit an act of bankruptcy, and so become amenable to the bankruptcy laws, be served upon a married woman. (*Re Hannah Lynes.*) Formerly a married woman (except perhaps when trading in the City of London as a sole trader) was not subject to the bankruptcy laws at all; for even where under the Act of 1870 she carried on a business for her own benefit it was held she could not be made bankrupt, even though she had separate property. (*Ex parte Jones*, *Re Grissell.*) And though it is expressly provided that the provisions of the act are not to affect any settlement, whether ante-nuptial or post-nuptial, respecting the property of any married woman, nor even are they to interfere with any restriction against anticipation, whenever or however imposed, in order to prevent fraud, it is enacted that no restriction against anticipation imposed by a woman in a settlement made by her of her own property is to be valid against her ante-nuptial creditors, and no settlement made by her is to be more valid against her creditors than it would be if made by a man against his creditors (see hereon, *Re Cameron*); so that a settlement by a married woman will be unavailing, even though it contains a clause against anticipation, against her ante-nuptial creditors, and, if post-nuptial and voluntary, it will be liable to be set aside by any creditor under 13 Eliz. c. 5, on the ground of its being fraudulent, or by her trustee under the bankruptcy laws. Several cases have been decided on the provision that the act is not to affect settlements. Thus, in *Re Stonor's Trusts*, it was held that property, which is a wife's for her separate estate under the act, is not bound by a covenant in a settlement, made

Restraint on anticipation, if imposed by married woman herself, will not avail against her creditors.

before 1883, to settle property to which she becomes entitled for her separate use, since if it had not been for the act it would not have been separate estate. And in *Christian* v. *Whittaker*, where a marriage settlement executed in 1873 contained a covenant to settle after-acquired property of the wife, except property given to or settled on her for her separate use, and the wife became entitled after 1882 to a legacy, not expressly settled on her for her separate use, it was held that, though sect. 5 of the act taken alone would make the legacy her separate property and bring it within the exception in the covenant, yet the effect of sect. 19 was that the legacy did come within the covenant to settle after-acquired property. (*Hancock* v. *Hancock*.)

Other cases show that the provision in sect. 19, that the act is not to affect settlements, applies equally to settlements made after 1882 as to those made before 1883. (See particularly *Stevens* v. *Trevor-Garrick*, *post*, pp. 398, 399.)

Investments made with moneys of husband may be paid to him.

With regard to the investments which the act authorizes the woman to make, it is provided, for the protection of the husband, that if any such investment be made by means of the moneys of the husband without his consent, the court may, on application, as prescribed by the act, order the investments, and the dividends or any part thereof, to be transferred and paid respectively to the husband.

Gifts by husband to wife.

To prevent creditors being defrauded by the husband giving property to his wife in order to avoid the seizure of the same for his debts, it is provided that nothing in the act is to give validity as against creditors of the husband to any gift by the husband to the wife of any property which after such gift continues in the order, disposition, or reputed ownership of the husband; nor is it to give any validity to any deposit or other investment of moneys of the husband, made by or in the name of the wife in fraud of his creditors, but such moneys or investments may be followed as if the act had not been passed.

Positive obligations thrown on wife by the act.

Lastly, the act casts certain positive obligations on the woman, by providing that justices may, on the application of the guardians of the poor, issue a summons against the wife of a man who has become chargeable to any union or parish, and an order may be made and enforced against her for payment out of her separate estate, in the same way as an order may be made

and enforced against a husband for the maintenance of his wife under 31 & 32 Vict. c. 122, s. 39. And a married woman possessed of separate estate is now made subject to all such liability to support not only her children, but also her grandchildren, as the husband is now subject to; but this is not to relieve the husband from any liability imposed on him to maintain his wife, children, and grandchildren.

Conclusion.

The Married Women's Property Acts, then, cannot be said to diminish to any important extent the practical utility of a marriage settlement. Indeed, that which is perhaps the main object of a settlement—the provision for the children of the marriage—is entirely untouched by them; and, independently of the provisions made by a settlement, there is nothing to prevent either husband or wife from squandering away their respective properties at their own free will, and at their death leaving the children utterly unprovided for.

We now proceed to consider at length settlements of personal property.

II. Settlements of Personal Property.

Settlements are always by deed.

By the fourth section of the Statute of Frauds, all agreements in consideration of marriage must be in writing and signed by the party to be charged thereby or his agent; and in practice settlements are always carried out by deed. The first function of the settlement is to vest the property proposed to be operated upon in the trustees, who are to be appointed to carry out the provisions of the settlement. The first question which will arise will be, How is this vesting of the property in the trustees to be carried into effect?

How the Trust Property is vested in the Trustees.

Mode of transferring property to the trustees.

The mode by which the property the subject of a settlement is vested in the trustees will depend on the nature of the property, and also on the character of the dealings which it may be proposed to have with it under the trusts of the settlement. If the property is of such a nature that it will pass by delivery, as in the case of personal chattels, or by transfer in the

books of banks or companies, as in the case of government stock, shares, &c., or by some deed in a statutory form, as in the case of railway debentures, the property will be vested in the trustees in the appropriate way as if they were purchasers, and the transfer will be recited in the settlement as having been made, it being expressly stated that the transfer is or has been made in trust for the owner until the solemnization of the intended marriage, and after that has taken place then upon the trusts contained in the settlement concerning the same.

Whether by the settlement itself or separate deed.

Where the proper mode of transferring the property is by deed, the question may arise whether the transfer should be effected by the settlement itself, or whether a separate deed should be employed. Which of the two courses should be pursued will depend on the answer to the question—Supposing the trustees are by the terms of the settlement to have the power to sell the property and to transfer it to a purchaser, will the assignment to them form a part of the title deeds to which the purchaser will be entitled? If an affirmative answer is given, it will be proper to effect the transfer by a separate deed, so that the settlement and its trusts may not become part of the title of the purchaser or transferee. (See *Capper* v. *Terrington*; *Dobson* v. *Land*.) Thus, if the property settled be a debt, secured by a mortgage, owing to the settlor, it will be more convenient to have the transfer to the trustees made by a separate deed, so that when the mortgage is paid off the settlement may form no part of the title deeds to which the mortgagor will be entitled. If such a plan be adopted the settlement would recite the mortgage and the transfer, and then proceed to declare the trusts.

When the trustees are intended to sell, by separate deed.

When no sale is intended, by the settlement.

But where it is not intended that the trustees shall be empowered to dispose of the property, the assignment may be made by the settlement itself. Thus, if the property consists of a reversionary interest in personal estate (which must be assigned by deed), the assignment may be incorporated in the deed of settlement itself; for there is here no intention to deal with it by way of disposing of it subsequently; but the idea is that the trustees shall hold it till it falls into possession.

When the property is land not intended to be strictly settled.

If the property consists of land, and it is not desired to put it into strict settlement, the usual course is to adopt the form known as a "trader's settlement" and to convey the land to the trustees

upon trust to sell, and then to hold the proceeds upon the trusts of the settlement. Such a direction will, by the doctrine of conversion, operate to impress the land with the character of personalty, and the ordinary clauses and provisions of a settlement of personalty can be made to apply. The land is conveyed to the trustees to the use of the owner and his heirs until the celebration of the intended marriage, and afterwards to the use of the trustees upon trust, at the request in writing of the husband and wife during their joint lives, and afterwards of the survivor, and after the death of the survivor at the discretion of the trustees, to sell. This plan prevents the land from being sold, unless the husband and wife during their lives, or the survivor after the death of one of them, desire it. The result is that, as there will be no need to sell the land, it may be enjoyed by them *in specie*, just as freely as if it had been settled by a strict settlement. And another advantage of this plan is, that when the time comes for dividing the property among the children all danger of an action for partition will be obviated, since there will be no right in any one child to insist upon its being divided in its form as land. In connection with such a settlement as this, the provisions of sect. 63 of the Settled Land Act, 1882, as read with sect. 6 of the Settled Land Act, 1884, must be borne in mind. (See *post*, p. 466.)

The Covenant to Settle After-Acquired Property.

This covenant is still desirable.

We now come to speak of the after-acquired property of the wife, which it is usual to include in the settlement. This property will now, in consequence of the Married Women's Property Act, 1882, be sufficiently protected from all claims by the husband (save that the act imposes no restraint upon her anticipating the income thereof and handing the same over to the husband); but the children of the marriage will derive no special benefit from such after-acquired property, unless it be expressly conferred on them by a settlement. Thus it will still be necessary to follow the old plan, and to include in the settlement the property which the wife may acquire or which may devolve on her after the marriage.

Usually covenant, or

The plan adopted for settling such property of the wife is

usually to insert in the settlement a covenant by both the husband and the wife that they will convey their interests in the property to the trustees; or sometimes it takes the form of an agreement and declaration by both parties that such property shall be subject to the settlement. In framing such a covenant or agreement and declaration great care should be exercised, and, amongst others, the following points should be borne in mind:— agreement and declaration.

The covenant should expressly include property to which the wife is entitled at the date of the settlement, or else it will not be sufficiently wide to comprehend property in which she has a reversionary interest at that time, but which does not fall into possession until the coverture has determined. (See *Agar* v. *George*.) If the covenant be merely to settle property to which the wife, or the husband in her right, shall become entitled during the coverture, as the words "shall become entitled" import a change of condition, so the covenant will not include property in which she has, at the date of the settlement, a vested interest in possession, or in which she has a reversionary interest, which, however, does not fall into possession until the coverture has determined. (See *Re Mitchell's Trusts*.) Nor does it include property over which the wife acquires a general power of appointment (see *Oliphant* v. *Gerard*), unless words are used in the covenant to extend it to such property. (*Hill* v. *Swartz*.) But such a covenant will include such reversionary property if the interest fall into possession during the coverture, for there is here a sufficient change of condition. (See *Archer* v. *Kelley*.) A covenant to settle the wife's after-acquired property, if made by the wife (*Butcher* v. *Butcher*), but not so if entered into by the husband alone (for in this case the husband only is bound: *Travers* v. *Travers*, and see *Dawes* v. *Treadwell*), will bind separate estate subsequently acquired, unless a restraint on alienation is annexed to the separate use, or it is excepted out of the covenant. (*Coventry* v. *Coventry; Gibson* v. *Way*.) In construing this covenant for the purpose of deciding whether property coming to the woman for her separate use under the Married Women's Property Act, 1882, falls within the covenant, the court, owing to sect. 19 of the act, looks at the matter as if the act had not been passed. (*Re Stonor's Trusts; Christian* v. *Whittaker;* What property will fall within the covenant.

Hancock v. *Hancock;* and see *ante*, p. 390.) The general form of covenant will, where the intention otherwise is not clearly expressed, only bind property acquired during the husband's lifetime (*Dickinson* v. *Dillwyn; Re Edwards; Re Campbell's Policies*), and is rendered inoperative by a judicial separation between the husband and wife. (*Dawes* v. *Creyke.*) In *Fisher* v. *Shirley*, a covenant by the intended husband to settle all property which came to him in his marital right was held to include property which came to him through his wife but after her death.

The covenant may be (although it rarely is) entered into by the intended husband as to his after-acquired property, and if he breaks the covenant, though specific performance cannot be obtained against him, yet damages to the value of the property, which ought to have been handed over to the trustees, will be recoverable by the trustees. (*Re Teavan;* and see *Hill* v. *Swartz.*)

Provision for an Immediate Income.

Method of providing for an immediate income.

Sometimes, in order to provide an immediate income for the married couple (which may be necessary when the property settled is of a reversionary nature and may not fall into possession for some time, as where a son about to marry is entitled to property on his father's death, and puts that into the settlement), the father of the intended husband or of the intended wife covenants with the trustees that he will pay them an annuity to be applied for the benefit of the young couple. In such a covenant the father generally binds himself to pay the annuity during the joint lives of himself and the son or daughter about to be married, provided the intended husband or wife or any issue of the intended marriage so long live. The money payable under such a covenant is settled in the same way as the reversionary interest is settled.

Settlement of a Life Policy.

Covenants and clauses usually inserted in a

Another kind of property which is often put into a settlement by the intended husband is a policy of assurance. He insures his life, and then assigns the policy and the sum assured to the

trustees, who are directed to hold them on the trusts expressed as to the general bulk of the property settled. The husband covenants not to do any act to render the policy void, to effect a new policy in case it should become void by any means, to duly pay the premiums, and to deliver the receipts therefor to the trustees upon demand. As it will be the duty of the trustees in most cases to keep up the policy, they may, in the event of the husband making default in paying any premium, pay it out of their own moneys; and if they do so, they will be entitled to reimburse themselves the money so paid, and will further have a lien on the policy for moneys so paid, and may transfer this lien to any third person who advances money to them for the purpose of paying the premium. (See *Re Leslie.*) And, as the trustees may have no available fund for the premiums, the settlement should expressly provide that the trustees shall not be responsible for any lapse of the policy which may occur. Should there be any chance of a bonus being declared on the policy, as this, in the absence of stipulation, goes in accumulation of the sum which the assured will receive on his death, it is sometimes stipulated that the trustees may, at the request of the husband, instead of treating such bonus as capital, authorize the husband to take advantage of the option usually given to the assured by the company, and have the bonus applied in the reduction of the amount of the premiums. Powers are sometimes given to the husband to redeem the policy on his paying to the trustees a stipulated sum, which is to be subject, when paid, to the trusts of the settlement, and provision is then made for the re-assignment of the policy to the husband.

settlement of a life policy.

As to the stamp duty charged on such settlements, see *post*, under head V.

Settlements by Infants.

With regard to the parties to the settlement, the Infants' Settlement Act (18 & 19 Vict. c. 43) authorizes infants (*i. e.*, males at any time after the age of twenty, and females at any time after the age of seventeen) to make binding marriage settlements of their property, real and personal. It is necessary, however, to apply in a summary way to the Chancery Division, and obtain the sanction of that court to the settlement. This

Settlements by infants with the court's approval.

will generally be granted as a matter of course, and without any inquiry being directed as to the propriety of the contemplated marriage. (See *Re Dalton.*) The act has a qualifying proviso to the effect that an appointment under a power, but only if connected with an estate tail (*Scott* v. *Hanbury*), or a disentailing deed executed by an infant tenant in tail under the act, shall, in the event of the infant dying under the age of twenty-one, be absolutely void; and further, that no leave is to be given to exercise a power of appointment given by an instrument directing that the power shall not be exercised by an infant.

To what settlements the act applies.

It was formerly held that the act did not authorize a post-nuptial settlement of the property of the wife (*Re Potter*); but in *Re Sampson and Wall*, as to infant wards of court, and *Re Phillips*, as to other infants, it was decided that the act was sufficiently wide to authorize a post-nuptial settlement of the property vested in the wife, if the property is such as could be disposed of by the infant were he or she an adult. The settlement may include a covenant to settle after-acquired property (*Moore* v. *Johnson*); but the act does not give the court power to allow the infant to settle property which an adult could not settle. (*Seaton* v. *Seaton.*) *Re Sampson and Wall* also shows that the court has no power under the act to compel the infant, if unwilling, to execute a settlement; and in *Leigh* v. *Leigh* it was said, that the act merely empowers the court to sanction a settlement, and does not give the court jurisdiction to compel such a settlement to be made.

Settlements outside the act.

A settlement made by an infant independently of this act is not void but voidable (*Duncan* v. *Dixon*), that is to say, it can be ratified by the infant on attaining majority, and it has been recently held that unless the quondam infant takes steps to repudiate the settlement within a reasonable time after attaining majority (*Edwards* v. *Carter*), or in case of a settlement of reversionary property within a reasonable time of the reversion falling into possession (*Farrington* v. *Foster*; and see *Hamilton* v. *Hamilton*), it will become binding upon him.

Stevens v. *Trevor-Garrick.*

But where an adult married an infant who was possessed of personal property which before marriage was settled, it was held that on attaining majority the quondam infant could not

repudiate the settlement, since though, had there been no settlement, the property would have been her separate estate under the Married Women's Property Act, 1882, yet, by virtue of sect. 19 of the Act, its provisions were displaced by the settlement, which must be regarded as a settlement made by the husband, and therefore binding. (*Stevens* v. *Trevor-Garrick.*)

Election in equity.

And in equity, when an infant makes a settlement of his or her property on her or his spouse, who also settles property on the infant, on attaining majority the quondam infant will be put to his or her election either to confirm the settlement and take under it, or to repudiate the settlement and give up all interest under it; but the election cannot be called for by a woman where the property, the subject of the election, is subject to restraint. (See *Weldon* v. *Piggott; Barrow* v. *Barrow; Greenhill* v. *North British, &c. Insce. Co.; Re Vardon's Trusts.*)

Covenants for Title.

Not advisable to make husband give full covenants for title.

Connected with the vesting of the property in the trustees is the question, What covenants for title should the settlor enter into? Formerly, especially where the property settled was land or a policy of assurance, it was usual to make the settlor enter into full covenants for title. But this is by no means a good plan. For the settlor is generally the husband, and in case of a breach of a covenant, it would be the duty of the trustees to sue him on the covenant. To do this would obviously affect not only the husband himself, but the wife and children of the marriage through him, and, indeed, would in most cases, instead of being a benefit to the latter, operate to their prejudice by perhaps ruining the husband. The usual course is not to insert any covenants by the settlor, other than a covenant for further assurance. This covenant need not now be inserted in express terms, for it may be implied by virtue of sect. 7 of the Conveyancing Act, 1881, which provides that every person who conveys and is expressed to convey "as settlor," shall be deemed to covenant for further assurance, and this covenant will extend to the acts of every person claiming under the settlor, either by deed or act and operation of law in his lifetime, subsequent to the settlement, or by testamentary disposition, or by devolution of law on his death.

The Trusts of the Settlement.

The usual trusts are—(i.) To hold for settlor till marriage.

The property having been vested in the trustees, the next function of the settlement is to declare the trusts upon which they are to hold it. The first of these will be to hold it upon trust for the settlor until the intended marriage. The object of this trust is, of course, that if the intended marriage does not take place, the ownership of the property shall not be altered. Thus, if it were to turn out that the parties were within the prohibited degrees, so that marriage was impossible, the first trust would then take effect. (See *Pawson* v. *Brown*.)

(ii.) After marriage to retain, or sell and invest.

The next trust is, that after the solemnization of the intended marriage, the trustees shall hold the property, and either retain in its existing state, or (generally with the consent in writing of the husband and wife during their joint lives, and of the survivor after the death of one of them, and on the death of the survivor, then at the discretion of the trustees) sell the same and invest the proceeds, with a power to vary the investments from time to time with the same consents, and then to stand possessed of the property or the proceeds of the investments thereof, upon trusts which will vary according as the property was brought into the settlement by the husband or the wife; for, as we have mentioned before, the property may come from either the intended husband or the intended wife; if it comes from the former, the general plan is to vest it in the trustees upon trust for the husband for life; but if it comes from the wife, the first life interest in the income is generally given to her for her separate use, without power of anticipation. Sometimes, however, the first life interest in the income of the whole estate, wherever it comes from, is given to the husband, and when this is done, it is proper to charge it with the payment to the wife of an annual income during the coverture. This latter plan is usually adopted when the husband is not in business, or is not earning an income from some trade or profession. But where he is engaged in business, or in the exercise of a profession, it is advisable to give the wife the first life interest in her own property; firstly, because it is to be presumed that the husband is deriving an income from his business or profession, and so will not stand in need of the income of his wife's property; and secondly, because it operates

(iii.) For husband or wife for life.

When husband in business, first life interest usually given to wife;

to protect it from the obligations he may incur to his business creditors.

and if given to husband, is made determinable on bankruptcy, or attempting to alienate;

With regard to these life interests, the following points should be noted. To protect the life interest of the husband from any obligations he may incur in business it is usual, especially when the trade he carries on is of a hazardous nature, to make it determinable on his bankruptcy, or on his attempting to alien or charge it. The law with regard to such limitations is, that they are valid when the property in which the husband takes the life interest comes from the wife or from some person other than the husband himself (*Dommett* v. *Bedford*); but when the property comes from the husband himself, they will be invalid as against his trustee in bankruptcy (*Higginbottom* v. *Holme*), but good as against his alienees. (*Brooke* v. *Pearson*; *Knight* v. *Browne*.) Again, the interest cannot be so limited as to continue in the husband after his bankruptcy or alienation: there must be a gift over, or the destination of the income during the rest of his life must in some way be provided for. (*Brandon* v. *Robinson*.) But where the husband receives part of his wife's property upon the marriage, and then settles property of his own upon himself, with a gift over in favour of his wife on his bankruptcy, this limitation of his own property will be valid as against his trustee in bankruptcy; for in such a case the wife is considered as a purchaser to the extent of the property belonging to her which has been received by the husband. (*Mester* v. *Garland*.) The limitation is generally deemed to refer to a bankruptcy, &c., occurring after the marriage, but it has been held that it would take effect even where the husband was an uncertificated bankrupt at the date of the settlement (*Manning* v. *Chambers*); and further, where the bankruptcy was annulled before the interest limited fell into possession, it was held that the husband's life interest was not determined under such a limitation. (*White* v. *Chitty*; and see *Ancona* v. *Waddell*.) Further, it has been held that where the life interest is given subject to a gift over on the husband's attempting to alien, assign, or mortgage it, and there takes place an involuntary alienation, *e.g.*, by bankruptcy, the husband does not in such a case forfeit his life interest. (*Whitefield* v. *Prickett*.) But the contrary has been held to be the case where the gift over was to take effect upon the husband "doing or

how far such limitations are valid.

suffering anything whereby the property might be assigned or charged. (See *Ex parte Eynston.*)

In *Roberts* v. *Ackroyd*, trust funds were limited during the life of the wife, and afterwards during the life or until the bankruptcy of the husband, with a gift over to the children "after the decease of the survivor," and the husband who survived his wife became bankrupt; the Court of Appeal held that the words "after the decease of the survivor" meant after the determination of a prior life interest, and that the children became entitled as if the husband were dead.

A restraint on anticipation can be annexed irrespective of the M. W. P. Act, 1882.

With regard to the restriction upon anticipation annexed to the life interest conferred by the settlement on the wife, this still applies, notwithstanding the Married Women's Property Act, 1882; for sect. 19 of that act expressly provides that nothing in the act shall interfere with or render inoperative any restriction on anticipation.

(iv.) After death of husband and wife for children or remoter issue,

The next trust is concerned with the destination of the settled property, or the income of the investments thereof, upon the decease of either the husband or wife. Upon such decease occurring it is usual to give the income to the survivor for life. After the decease of the survivor the trust is for such child or children or remoter issue of the intended marriage at such age or time, or at such ages or times, not being earlier as to any object of the power than his or her age of twenty-one years, or day of marriage, in such shares, if more than one, and on such conditions and in such manner as the husband and wife shall by deed or deeds jointly appoint, and in default of appointment as the survivor shall by deed or will appoint, and in default of such appointment, then in trust for all the children of the intended marriage, who being sons shall attain the age of twenty-one years, or being daughters shall attain that age or shall marry under that age, in equal shares; and if there is but one child, then in trust as to the whole fund for that one child.

as parents appoint;

and failing appointment equally among the children.

(v.) The hotchpot clause.

The general trust, in default of appointment for the children of the marriage in equal shares, is qualified by the insertion of what is known as the hotchpot clause. This clause declares that no child to whom any share has been appointed shall take

any share in the unappointed part without bringing his appointed portion into hotchpot and accounting for the same. The object of the clause is to prevent any child to whom an appointment has been made from taking, in addition to the property appointed to him, a share in the residue which remains unappointed equally with children to whom no appointment has been made. Thus, suppose there were a fund of 4,000*l.*, and there were three children of the marriage, and to one of them, A., 1,000*l.* had been previously appointed by the father. If the remainder of the fund, 3,000*l.*, were left unappointed, the children, including A., would, in the absence of a hotchpot clause, be entitled to 1,000*l.* each, and A. would thus get 2,000*l.*, while the other two children would only get 1,000*l.* each. But under the operation of a hotchpot clause, A. would have to bring into account the 1,000*l.* previously received by him as a condition of his receiving a share of the remaining 3,000*l.*, so that he would only get 333*l.* 6*s.* 8*d.* of the unappointed sum, which, together with the 1,000*l.* he had previously received, would amount to 1,333*l.* 6*s.* 8*d.*, or one-third of the whole trust fund, a share equal to that received by each of the other children. It has been held that a hotchpot clause will not be implied in a settlement. (See *Re Alfreton's Trusts*, and *Re Bacon's Trusts*.)

(vi.) The advancement clause.

An advancement clause should also be inserted in the settlement, in order to enable the trustees to raise a part of an infant child's vested or presumptive share and apply it for his advancement, preferment, or benefit. The clause, as usually framed, authorizes the trustees, with the consent in writing of the parents during their joint lives, and of the survivor during his or her life, and after the death of the survivor at the discretion of the trustees, to raise any part not exceeding one-half of the vested or expectant share of any child or issue of the marriage, and to apply the same for his advancement or benefit as the trustees may think fit. Note that this power must still be expressly inserted, and is not implied by sect. 43 of the Conveyancing Act, 1881, which merely allows the *income* of trust funds to be applied for the maintenance, education, and benefit of the infants.

(vii.) The maintenance and accumulation clauses.

It was further usual to insert a maintenance and accumulation clause, in order to provide for the destination of the trust property, should the parents die during the minority of the

children. This clause generally empowered the trustees to apply the whole or part of the income of the expectant share of any infant child for his maintenance and education, and to accumulate the residue and add the accumulations thereof to the capital of the share. A clause of this kind was impliedly annexed to settlements executed after the 28th August, 1860, by Lord Cranworth's Act, sect. 26. But this provision has been superseded by sect. 43 of the Conveyancing Act, 1881, which enacts that, where property is held by trustees in trust for an infant, *either for life* or any greater interest, and whether absolutely or contingently on his attaining twenty-one, or the occurrence of any event before his attaining that age, the trustees may at their sole discretion pay to the infant's *parent or* guardian (if any), or otherwise apply for or towards the infant's maintenance, education, *or benefit, the income of that property*, or any part thereof, whether there is any other fund applicable to the same purposes, or any person bound by law to provide for the infant's maintenance or education, or not. The trustees shall accumulate the residue of that income at compound interest for the benefit of the person who ultimately becomes entitled to the property. Proviso that the trustees may apply the accumulations, or any part thereof, as if the same were income arising in the then current year, and such accumulated income belongs to the person for whose maintenance, &c. it might have been used. (*Humphreys* v. *Levett.*)

To what instruments the clauses extend.

This provision extends to instruments coming into operation either before or after the commencement of the act, and may be excluded or varied by the settlement.

To whom money may be paid.

As the income is by the act payable to the parent of the infant as well as his guardian, it may be advanced to the mother for the infant's benefit after the death of the father, though she may not be the infant's sole guardian, as where the father has appointed a guardian under 12 Car. 2, c. 24. (See *Re Cotton.*)

For what purposes the advancement may be made.

Under the clause implied by the act an advancement may be made for the general benefit of the infant, and not merely for his maintenance or education, and the expression "benefit" gives the trustees a very wide discretion. (See *Lowther* v. *Bentinck.*) They may apply past accumulations of income in recouping the father of an infant what he has paid for the infant's maintenance (*Re Pitt's Settlement*),

and they may apply the income, though it is directed by the trust instrument to be accumulated. (*Re Thatcher's Trusts.*) Under the clause as implied by Lord Cranworth's Act, the advancement could only be made out of the income to which the infant "might be entitled," which was held not to enable an advance to be made where the infant on attaining twenty-one would not be entitled to interest on his share or legacy, as the case might be, till the payment of the share itself. Thus, in *Re George*, where a legacy was given by her father to G., "if and when she should attain the age of twenty-one," and an annual sum was set aside for her maintenance during minority, it was held that no interest was payable during minority on the legacy, and that Lord Cranworth's Act did not apply, as it only was available in cases where the infant was either entitled absolutely to the principal and income, or was entitled to the principal contingently in such a manner that he would, on coming of age, become entitled to the accumulated income also; and though it was thought that the Conveyancing Act, 1881, would now meet such a case as *Re George*, it has been held, in *Re Dickson, Hill* v. *Grant*, that the principle of *Re George* is applicable to sect. 43 of the Conveyancing Act. In this case contingent legacies were given to persons not the children of the testator, and in consequence such legacies did not carry interest in favour of the legatees before vesting, but such intermediate interest or income went to the residuary legatee, and it was held by the Court of Appeal that sect. 43 of the act did not apply, and the income could not be used for the maintenance of the legatees. And it has been since held that where, as in such a settlement as we are considering, property is to be divided among children as a class who attain twenty-one, the statutory provision for maintenance only applies until one of the children attain twenty-one, since on that event happening the whole of the income belongs to that child (see *Adams* v. *Adams; Re Jeffery;* and *Hamilton* v. *Hamilton*), and consequently some express provision for maintenance is still required, and if reliance is placed on the statutory clause, some special words should be added to meet the above cases. Further, the statutory provision will not be applicable where the vesting of the fund is postponed till after the age of twenty-one, or where the infant's interest, though vested, is defeasible. (See *Re*

Express maintenance clause cannot apparently be safely omitted.

Buckley.) Such a case (the vesting after twenty-one) cannot, however, occur under an ante-nuptial settlement, as the vesting of shares must take place within twenty-one years, or the limitation will be void as offending against the perpetuity rule.

It will be noticed that the Conveyancing Act allows the money to be advanced, for the infant's maintenance, whether or not there is any person bound by law to provide therefor. This was a doubtful point before the act. (*Ransome* v. *Burgess; Wilson* v. *Turner; Brophy* v. *Bellamy.*)

(viii.) Trusts in the event of no issue.

The last trust of the property is concerned with declaring what shall be its destination if there be no child of the marriage who lives to attain a vested interest under the previous trusts. With regard to the property brought into the settlement by the husband, it is declared that it shall be held in trust for him absolutely. As to the property brought in by the wife, it is declared that it shall be held upon trust for her absolutely if she shall survive the coverture, but if she should die during the intended coverture, then "upon such terms as she, whether covert or discovert, shall by her will appoint, and in default of such appointment, and so far as any such appointment shall not extend, in trust for the person or persons who, under the statutes for the distribution of the effects of intestates, would, on her decease, have been entitled thereto if she had died possessed thereof intestate, and without having been married; such persons, if more than one, to take as tenants in common in the shares in which the same would have been divisible between them under the same statutes."

Object of trust of wife's property.

The object of the lengthy trust, which is declared in the event of the wife dying during the coverture, is, unless the wife thinks proper under the power conferred upon her to appoint the property to him, to exclude the husband from taking her property on her death. For if it were simply given to her absolutely, and she died before her husband, it would constitute a reversionary chose in action, and the husband, on taking out administration, would be entitled to the whole of the property.

Meaning of words "die without having been married,"

The words "died without having been married" have been employed, and not the words "died unmarried," for these latter words in a settlement have been held to mean "not under coverture at the time of her death," with the result that if the wife

should die leaving a husband and an infant child, the infant child would take the property, and should he die under age, the husband, as his next of kin, would take his share, and so the wife's relations would be entirely excluded (see *Dalrymple* v. *Hall; Pratt* v. *Matthew*); but it has been held that the words "die unmarried" have the same meaning as the words "die without ever having been married," and so either expression can be used (*Blundell* v. *De Falke*); and while both expressions thus exclude the husband, and anyone claiming through him, which is the object sought to be attained, yet neither expression would have the effect of excluding the issue of the wife of a former marriage. (See *Re Arden's Trusts*, and *Stoddard* v. *Savile*.) Again, the words "next of kin" should not be used in substitution for the more lengthy expression, "the persons entitled under the Statutes of Distribution;" for "next of kin," without reference to the Statutes of Distribution, include only the nearest blood relations in the same degree. (*Halton* v. *Foster;* and see *post*, under "Construction of Wills," in Part VI.

Power of appointment in favour of second husband, &c.

In some cases, *e. g.*, where the wife brings into settlement much more than the husband, and especially if, from the circumstances, she is likely to survive her husband, it is desirable to reserve to her a power of appointment over at least a part of the settled funds in favour of any future husband she may marry $\frac{\text{and}}{\text{or}}$ the children of any future marriage.

In exercising the powers of appointment conferred by the settlement, care must be taken not to offend the rules of law respecting appointments under powers. To these rules attention is drawn in the chapter on powers of appointment at a later page in this book. (See *post*, Part VII.)

Trustee Clauses.

We now propose to consider some of the usual clauses inserted in settlements with the object of conferring certain powers on the trustees. The most usual of these clauses are:—

The Investment Clause.
The Receipt Clause.
The Power to compound and settle Claims.
The Indemnity and Reimbursement Clauses.
The Power to appoint new Trustees.

Preliminary remarks.

Before offering a few words on each of these clauses, we may notice that powers given to trustees are not usually given to them and their "assigns"; for it is not the intention that they shall be exercised by any person to whom an assignment may be made by them. They are to be exercised by the trustees themselves, and by new trustees who may be from time to time appointed under the settlement, and these latter derive their capability to exercise the powers not from the original instrument, but from the deed which appoints them. Further it is not necessary to confer the powers expressly on them, "and the survivor or survivors of them," as was formerly done; for by sect. 22 of the Trustee Act, 1893, which takes the place of sect. 38 of the Conveyancing Act, 1881 (now repealed), a power or a trust vested in two or more persons jointly, unless the contrary is expressed in the instrument creating the power or trust, may be exercised by the survivor or survivors of them. Trusts could always have been executed by any person who was for the time being the owner of the legal estate in the trust property. So that where land was devised to two or more persons upon trust that they or their heirs or assigns should sell, the survivor or survivors of such persons, and the heir of the survivor, independently of the act, could have sold (*Morton* v. *Hallett*); but with regard to powers which were simply collateral, these could not be exercised by any persons other than those to whom they were expressly given, and the object of the above statutory enactment (which only applies to instruments coming into operation after 1881) is to place powers on the same footing as trusts.

The investment clause.

Independently of express provision and of statutory enactment, trustees can only invest in 3*l.* (now $2\frac{3}{4}$*l.*) per Cent. Annuities. But unless forbidden expressly by the trust instrument (see *Hume-Dick* v. *Lopes*), by virtue of the Trustee Act, 1893 (formerly the Trust Investment Act, 1889), trustees may invest in any of the following securities:—

1. Parliamentary stocks or public funds or government securities of the United Kingdom.

2. Real or heritable securities in Great Britain or Ireland.

[Real securities sometimes include leaseholds (see sect. 5 of the act, *post*, p. 412.) It also includes freehold ground rents, but it does not authorize the purchase of such rents, but merely

lending money on the security of them; nor, indeed, does it authorize the purchase of any property. (See *Vickery* v. *Evans*, *Re Boyd's Settlement*, and *Leigh* v. *Leigh*; see also *Want* v. *Campain* as to the investment of trust funds on second mortgage of real property).]

3. Bank of England or Ireland Stock.

4. India Three and a Half or Three per Cent. Stock, or other India Stock in future issued by the Secretary of State in Council of India under the authority of an act of parliament and charged on the revenues of India.

5. Securities the interest of which is guaranteed by parliament.

6. In Consolidated Stock created by the Metropolitan Board of Works or the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District.

7. Debenture or rent-charge or guaranteed or preference stock of any railway company in Great Britain or Ireland, incorporated by special act of parliament, and having for ten years past paid a dividend of three per cent. per annum at least on its ordinary stock.

[By rule of court funds in court may be invested in such stock, provided any sort of dividend has been paid during each of the last ten years, and securities open to the investment of such funds are also open to trustees (see 15, *infra*); but trustees would not, in the face of the statutory enactment requiring a dividend at the rate of three per cent. to have been paid, be wise in investing in such stocks where a less dividend had been paid, although probably they would not, owing to the provision under 15, *infra*, be liable for any loss arising therefrom; but this is by no means clear, as by sect. 4 of the act the investments allowed by the act are in the discretion of the trustees, and trustees are liable if they exercise their discretion unwisely.]

8. Stock of a railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity, or for not less than two hundred years at a fixed rental to any such railway company as is mentioned in (7) either alone or jointly with any other railway company.

9. In debenture stocks of any railway company in India the interest on which is paid or guaranteed by the Secretary of State for India.

10. In "B" annuities of the Eastern Bengal, the East Indian, and the Scinde, Punjaub, and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State for India and charged on the revenues of India, and which may be authorized by statute to be accepted by trustees in lieu of any stock held by them in the purchased railway, *and also in the Deferred Annuities comprised in a register of holders of annuities, Class D., and annuities comprised in the register of annuitants, Class C., of the East Indian Railway Company.*

[These last annuities, which we have italicised, were not allowed by the Trust Investment Act, 1889.]

11. In the stock of any railway company in India on which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State for India, or upon the capital of which the interest is so guaranteed.

12. In debenture, guaranteed or preference stock of any company in Great Britain or Ireland established to supply water for profit, and incorporated by act of parliament or charter, and having for the previous ten years paid a dividend of at least five per cent. per annum on the ordinary stock.

13. In nominal or inscribed stock issued or to be issued by the corporation of any municipal borough with a population, according to the last census, of 50,000 at least, or by any county council under the authority of statute or a provisional order.

14. In nominal or inscribed stock issued or to be issued by any commissioners incorporated by statute to supply water, with a compulsory power to levy rates over an area having a population, according to the last census, exceeding 50,000, provided that for the ten previous years the rates levied have not exceeded eighty per cent. of the amount authorized by law to be levied.

15. In any stocks, funds or securities authorized for the investment of cash under the control or subject to the order of the court, made or to be made.

The rules at present in force on the subject, and dated November, 1888, provide the following list of investments:—

"Two and Three-quarters per Cent. Consolidated Stock (to

be called, after the 5th of April, 1903, Two and a Half per Cent. Consolidated Stock):

"Consolidated Three Pounds per Cent. Annuities:

"Reduced Three Pounds per Cent. Annuities:

"Two Pounds Fifteen Shillings per Cent. Annuities:

"Two Pounds Ten Shillings per Cent. Annuities:

"Local Loans Stock under the National Debt and Local Loans Act, 1887:

"Exchequer Bills:

"Bank Stock:

"India Three and a Half per Cent. Stock:

"India Three per Cent. Stock:

"Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment:

"Stocks of Colonial Governments guaranteed by the Imperial Government:

"Mortgage of freehold and copyhold estates respectively in England and Wales:

"Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent:

"Three per Cent. Metropolitan Consolidated Stock:

"Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stock or shares:

(Note remarks under head 7, *ante*, p. 409.)

"Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of investment."

Full power to vary these investments from time to time is given. These statutory powers of investment are made exercisable at the discretion of the trustees, but subject to any consent required by the trust instrument, and are in addition to any powers conferred by the trust instrument (sect. 3); and by sect. 4 they are applicable as well to trusts created before as after the act; and it has been held that trustees whose trust funds were

invested under the authority of the trust instrument at the time when the statutory enactments came into operation (1st Jan. 1894) were by virtue of the Act able to shift the investment and invest the trust funds in one of the statutory investments. (See *Hume-Dick* v. *Lopes;* and see *Re Clergy Orphan Corporation.*)

Redeemable stocks.

A trustee may invest in any of the stocks, funds, shares, or securities mentioned or referred to in the Trustee Act, notwithstanding the same are redeemable, and the price exceeds the redemption value. But a trustee may not purchase, at a price exceeding its redemption value, any stock mentioned or referred to in heads 7, 9, 11, 12, and 13, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate. This restriction does not apply to the new security mentioned in No. 10, *supra.*

By sect. 5 of the Trustee Act, 1893, further powers of investment are conferred, and in particular by its provisions the power to invest in real securities authorizes an investment in a mortgage of property held for an unexpired term of not less than two hundred years, and not subject to any reservation of rent greater than 1*s.* per annum, or to any right of redemption, or to any condition for re-entry, except for non-payment of rent. And where trustees hold money in trust to lay it out in the purchase of land to be settled in strict settlement, they may invest it, with the consent of the tenant for life, in the investments authorized by the Settled Land Act, 1882, s. 21, which, *inter alia*, authorizes investments in debentures and debenture stock of railway companies in Great Britain or Ireland, incorporated by special act of parliament, and having for ten years next before the investment paid a dividend on its ordinary stock or shares. (See sect. 33 of the 1882 Act.)

Where trustees are about to invest the trust funds on mortgage of land, we have already pointed out the precautions they should observe (see *ante*, pp. 228—231).

Liability of trustees for improper investments;

By making improper investments, the trustees will incur liability should any loss occur to the trust estate, and they will also be liable for not investing when they ought to have done so.

If a trustee makes improper investments, and some of the investments cause a profit and others a loss to the trust estate, but the profit exceeds in amount the loss, the profit belongs to the *cestuis que trust*, and the loss must be sustained by the trustee. He cannot set off the profits made against the losses sustained. (*Farrar* v. *Farrar*.) These remarks are subject to sect. 9 of the Trustee Act, 1893, which provides that where a trustee has improperly advanced trust money on a mortgage security which would have been a proper investment for a less sum than he actually advanced, the security will be deemed an authorized investment for such less sum, and the trustee will only be liable to make good the sum advanced in excess, with interest. (See hereon *Walker* v. *Walker*.)

for loss by failure of bankers;

Trustees will not be liable for loss occasioned by the failure of bankers with whom money has been left pending a permanent investment, unless they have allowed the deposit money to remain on such deposit without sufficient reason. (*Johnston* v. *Newton*.) Thus, where the money had been left on deposit for fourteen months, and was lost by failure of the bank, it was held that the trustee must make good the loss, since the period was too long to allow trust money to remain on deposit. The court said the money ought to have been invested after six months. (*Cann* v. *Cann*.)

by fraud of solicitor;

A trustee is, however, apparently liable for loss occasioned by the fraud of his solicitor. (See *Bostock* v. *Floyer*; *Sutton* v. *Wilders*.) And if trustees confide the management of the trust to their solicitor, they are liable for any loss which may be occasioned by his fraud. (*Dewar* v. *Brooke*.)

by fraud of broker.

But where a trustee, with the consent of his *cestui que trust*, had employed a broker to invest the trust money, and had allowed it to remain in his hands for investment, and the money was embezzled by the broker, it was held that the trustee was not liable for the loss, as he was simply acting in the ordinary way in which he, as a cereful man, would have acted had the money been his own, and the agent employed was not acting out of the scope of his profession as broker. (*Speight* v. *Gaunt*. See also *Bullock* v. *Bullock*; *Fry* v. *Tapson*.)

Delegation by trustee.

By the Trustee Act, 1893, s. 17 (a section which takes the place of sect. 2 of the Trustee Act, 1888, now repealed), a trustee

may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under a policy of assurance, by allowing the latter to have the custody of and to produce such policy, with a receipt signed by the trustee; but the trustee must not allow the money received by the solicitor or banker to remain in their hands for a longer period than is reasonably necessary to enable them to pay the same to the trustee.

The receipt clause: Why formerly inserted.

A receipt clause was formerly inserted in settlements, because the rule was that a purchaser from a trustee was, in the absence of an express power to the trustee to give receipts, bound to see to the application of the money paid by him, except where (1) The trusts were of so complicated a nature that the purchaser could not be expected to go into them, as where they were for payment of debts generally. (*Elliott* v. *Merriman.*) (2) Where the trusts were simple, yet it was apparent from the trust instrument that the author of the trust contemplated the possibility of some of the *cestuis que trust* being under disability at the time of sale. (See *Sowersby* v. *Lacey.*) (3) Where an intention to impose on the purchaser the duty of seeing to the application of the purchase-money could not reasonably be inferred. Powers to give receipts which would discharge a purchaser were conferred by Lord St. Leonards' Act, s. 23, and Lord Cranworth's Act, s. 29. But these two enactments are now superseded by the provision of sect. 20 of the Trustee Act, 1893 (which takes the place of sect. 36 of the Conveyancing Act, 1881, now repealed), which provides as follows:—The receipt *in writing* of any trustees or trustee for any *money, securities, or other personal property or effects*, payable, transferable, or deliverable to them or him under any trust or power, shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application, or being answerable for any loss or misapplication thereof. (2) This section applies to trusts created either *before or after* the commencement of the act. In view of this provision, you need not now insert any receipt clause in a settlement, as the statutory power to give receipts is sufficiently extensive.

Why no longer necessary.

The power to

A power to compound was generally inserted in settlements;

compound and settle claims: Why not now necessary.

but it may now be omitted, and the provisions of sect. 21 of the Trustee Act, 1893 (which takes the place of sect. 37 of the Conveyancing Act, 1881, now repealed), relied on. This section empowers an executor or administrator, or two or more trustees acting together, or a *sole acting trustee*, where the trust instrument authorizes a sole trustee to exercise the trusts and powers thereof, to accept any composition or any security, real or personal, for any debt or property claimed, and to allow time for payment of any debt, and to compromise, compound, abandon, submit to arbitration, or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate, or to the trust, and to execute any such instruments, &c., as may seem necessary, without being responsible for any loss. These powers are only available in those cases in which the section is not excluded by the expression of contrary intention, but it applies to executorships, administratorships, and trusts constituted or created either *before or after* the commencement of the act.

Formerly executors, administrators, and trustees could compound debts, but they were laid under the *onus* of proving that the composition was beneficial to the estate (*Ward* v. *Ward*); but now, under the new act, as they are directly empowered to accept compositions, and to compromise, &c., it would seem that it lies on the person beneficially interested to show that the composition, &c., was actually prejudicial. Administrators were not included in sect. 37 of the Conveyancing Act, 1881, and this is the only alteration effected by the Act of 1893 on this subject.

The indemnity and reimbursement clause: Why not now necessary.

The insertion of an indemnity clause is generally useless: as usually framed it provided that trustees should only be liable for moneys actually received by them, notwithstanding they signed receipts for the sake of conformity, and that each of them should be answerable only for his own acts and defaults, and that they might pay their expenses out of the trust property. A trustee, however, is indemnified, and has powers to this extent under the ordinary doctrines of equity, without the insertion of any express clause in the settlement which would give him no further protection; and moreover the Trustee Act, 1893, s. 24 (formerly Lord St. Leonards' Act, 1859, s. 31, now repealed), and the Settled Land Act, 1882, make such a clause implied in

all deeds, wills, or other instruments creating a trust. The express indemnity clause also exempted trustees from liability for dispensing with the investigation of a lessor's title on lending money on or purchasing leaseholds, or for lending money or purchasing property with less than a marketable title, or for the deficiency of any investment, or for any loss except such as occurred through their wilful default. This clause, however, was also practically useless, and now, under the Vendor and Purchaser Act, 1874, and the Conveyancing Act, 1881, sect. 3, trustees are protected who dispense with the lessor's or under-lessor's title, on the purchase of a lease or underlease. Occasionally a very strong indemnity clause is inserted under which the trustee is protected from every default, &c. by a co-trustee, except when he actually colludes with him; but as such a clause has the effect of preventing one trustee being obliged to look after his co-trustee, in the interests of the *cestuis que trust* such a clause should not be lightly inserted. (*Wilkins* v. *Hogg*, and *Pass* v. *Dundas*.)

When trustee a solicitor, re-imbursement clause required.

A provision should be inserted in the settlement authorizing a trustee who is a solicitor, and who it is intended shall act as solicitor to the trust, to charge for professional services just as if he had not been appointed a trustee; for in the absence of such a power he will only be allowed costs out of pocket. (*Moore* v. *Frowd*.) But even where a solicitor trustee is empowered to retain his professional costs he will not be allowed to charge for things which a trustee ought to have done without employing a solicitor, *e. g.*, attending at a bank to make transfers, &c. (See *Harbin* v. *Darby*, *Re Ames*.) It has, however, been held, that where one trustee is a solicitor, and an action is brought against the trustees, the solicitor trustee may be employed by his co-trustees to defend the action, and may recover his charges from the trust estate, even though he was not expressly authorized to make charges by the trust instrument. (See *Cradock* v. *Piper*.) And, further, where business is done in an action, whether hostile or not, or even in friendly proceedings on behalf of himself and his co-trustees, a solicitor trustee may receive the usual charge if there has been no greater cost than would have been incurred if the solicitor had acted for the co-trustees alone. (*Re Corsellis*.) Further, it was held in

Clack v. *Carlon* that where a trustee solicitor was a member of a firm he could employ his partners to do legal work for the trust, and that they could make the usual charges, provided that the trustee partners did not share them. The rule laid down in this case, however, has not met with judicial approbation in cases where the courts have had occasion to comment upon it; it has, however, never been distinctly overruled. (See *Lawton* v. *Elwes*; and see *Re Donaldson*; *Re Barber*; *Burgess* v. *Vinicome*; and *Re Pooley*.)

Appointment of new trustees.

It is now unnecessary to insert an express clause conferring powers to appoint new trustees; for the Trustee Act, 1893 (superseding similar provisions now repealed contained in the Conveyancing Acts, 1881, 1882, and 1892, and the Settled Land Act, 1890), incorporates into instruments creating trusts, dated either before or after the commencement of the act (unless the provisions thereof are excluded by expression of contrary intention), sufficiently ample powers for the purpose. It will be necessary to examine with some care the subject of the appointment of new trustees. There are three authorities under which such appointments may be made:—(1) By virtue of powers conferred by the author of the trust; (2) By means of an order of the Chancery Division made under the Trustee Act, 1893, s. 25; (3) By virtue of sect. 10 of the Trustee Act, 1893.

Statutory power of appointing new trustees:

when exercisable;

By this last-named provision, where a trustee (either original or substituted, and whether appointed by a court or otherwise),

(a) Is dead;
(b) Desires to be discharged from all or any of the trusts, &c.;
(c) Remains out of the United Kingdom more than twelve months;
(d) Refuses to act in the trusts;
(e) Is unfit to act;
(f) Is incapable of acting,

the following persons may appoint new trustees:—

by whom exercisable.

1. The person nominated for that purpose in the trust instrument;

OR (if there is no such person, or no such person able and willing to act), then—

2. The surviving or continuing trustees or trustee for the time being, and a "continuing trustee" will include one who has made up his mind to retire (*Re Glenny and Hartley*); or,
3. The personal representative of the last surviving *or* continuing trustee. Whether this will include the executor or administrator of a "sole" trustee is doubtful. (*Re Shafto's Trusts.*)

Increase in number of trustees.

Under the ordinary express power to appoint new trustees the number of trustees could not be increased. (*Rex* v. *Lexdale.*) By sub-sect. 2 of sect. 10 of the Trustee Act, 1893, on the appointment of a new trustee, the number of trustees may be increased. And it further enacts that on the appointment of a new trustee it shall not be obligatory to appoint more than one trustee where only one trustee was originally appointed; nor shall it be necessary to fill up the original number of trustees where *more than two* trustees were originally appointed: so that the new act enables the number of trustees to be *decreased* when they originally exceeded two in number. As a rule, the court would not decrease the number of trustees, except where in its opinion the original number appointed was excessive. (*Vide Re Harford's Trusts.*) This sub-section also provides that a trustee, on appointing a new trustee, shall not be discharged from his trust unless (a) on his retirement there be left at least two trustees to perform the trust; or (b) only one trustee was originally appointed. For example, if there were four trustees originally appointed, and three died, the survivor, in appointing new trustees, could reduce the number, but he would have to leave at least two trustees to carry out the trust; so that if he wished to retire, he could not appoint less than two new trustees, in order to be himself discharged. But if he himself intended to remain in office, he would not be bound to appoint more than one additional new trustee to act with him.

Decrease in number of trustees.

Separate sets of trustees.

And the same sub-section particularly provides, to meet the difficulty which arose in *Savile* v. *Couper*, that on the appointment of a new trustee a separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property,

notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part.

How property is vested in new trustee.

Powers of new trustee.

Section 3 of the act also provides that, on the appointment of a new trustee, any assurance or thing requisite for vesting the trust property jointly in the persons who are trustees, shall be done; and that every trustee so appointed, as well before as after *all* the trust property becomes vested in him, shall have the same powers, authorities and discretions, and may in all respects act as if he had originally been appointed by the trust instrument.

A doubtful point set at rest.

The act provides that new trustees may act before the trust property is vested in them; but, at the same time, it enacts that, on the appointment of a trustee, any assurance or thing requisite for vesting the trust property in the new trustees shall be done. Sub-sect. 6 provides that the enactments of the section relating to a *trustee who is dead* shall include the case of a person nominated in a will dying before the testator, and those relating to a continuing trustee shall include a refusing or retiring trustee. Supposing, however, a testator appointed A. and B. his trustees, and A. became lunatic during the testator's lifetime, the statutory enactment would seem not to apply to such a case, so as to enable B. to appoint a new trustee. (*Vide Newton* v. *Newton.*) In *Nicholson* v. *Field* it was held that the statutory powers did not apply in a case where A., by his will, appointed B. and C., who predeceased him, his trustees, so as to enable the personal representative of the survivor of B. and C. to appoint a new trustee. (See also *Re Parker's Trusts*, which shows that the general executors of a last surviving trustee, and not the special executors under his will, are the persons to appoint a new trustee under the statute.) In *Re John Gibbons' Trusts*, it was said that petitions for the appointment of new trustees ought not to be presented where the power given by the act could be exercised, and the court will not make an order where the statutory power is exercisable

by a person who is desirous of exercising it. (See *In re Higginbottom.*)

The statutory power of appointing new trustees is made applicable by sect. 47 of the Trustee Act, 1893 (which supersedes sect. 17 of the Settled Land Act, 1890, now repealed), for appointing trustees for the purposes of the Settled Land Acts. (See *post*, p. 443.)

Retirement of new trustees.

Before the Conveyancing Act, 1881, one of several trustees could not retire from the trust without appointing a successor, except—

1. Under a power to that effect specially given by the trust instrument.
2. By the consent of the *cestuis que trustent*, they being *sui juris*.
3. By the authority of the court. (See *Forshaw* v. *Higginson*; *Wilkinson* v. *Parry*.)

Statutory power of retirement.

But under sect. 32 of that act (since repealed), and now by sect. 11 of the Trustee Act, 1893, where there are *more than two* trustees, *one* of them may retire without any new trustee being appointed in his place. The retirement can only take place under the following circumstances:—

(a) Two trustees must be left to perform the trust:
(b) The retiring trustee must declare his desire to be discharged from the trust *by deed:*
(c) His co-trustees, *and also* such other person, if any, as is empowered to appoint new trustees, must consent to his discharge, and also to the vesting of the trust estate in the remaining co-trustees alone, *by deed:*
(d) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone must be done.

If all these requisites are observed, the retiring trustee shall be deemed to have retired from the trust, and shall be by the deed discharged from the trust without any new trustee being appointed in his stead.

This provision applies to trusts created *either before or after* the commencement of the act, but only so far as not excluded by the expression of contrary intention in the trust instrument, and subject to the provisions thereof.

As to the appointment

Sect. 37 of the Trustee Act, 1893, gives to trustees appointed

by the Court of Chancery, *i. e.*, by the Chancery Division, or any other court of competent jurisdiction (*i. e.*, the palatine courts and county courts), as well before as after the trust property is vested in them, the same powers, authorities and discretions as they would have had if they had been originally appointed in the trust instrument. The section only applies to trustees appointed *by some court;* the case of trustees appointed otherwise being already provided for in sect. 10. Under the old law, a new trustee appointed by the court could only exercise such of the powers given to the original trustees as were not arbitrary, or of a specially discretionary nature. (*Doyley* v. *Att.-Gen.*) Nor could such trustees exercise a power which the author of the trust had given to his trustees *nominatim*. (*Newman* v. *Warner.*)

of trustees by the court.

The vesting of the trust property in the new trustees may be, by virtue of sect. 11 of the Trustee Act, 1893 (which takes the place of sect 34 of the Conveyancing Act, 1881, now repealed), effected by a *declaration* by the appointor in the *deed*, by which the new trustee is appointed, to the effect that *any* estate or interest in the trust property, as well as the right to recover any debt or other thing in action, the subject of the trust, shall vest in the *persons who by virtue of the deed become and are the trustees for performing the trust.* When such a declaration is made, it will operate, without any conveyance or assignment, to vest the trust property in the persons who become the trustees as joint tenants.

How property may be vested in new trustees.

1st. The declaration must be made on the appointment of new trustees, and that appointment must be by deed. Under sect. 10, the appointment of new trustees need only be by writing; but under this section, if it is wished to take advantage of the declaration for vesting the trust property in the new trustees, it must be by deed.

By declaration;

2nd. (a) The legal interest in copyhold or customary land;
(b) Land in mortgage to the trustees;
(c) Shares or stocks transferable only in the books kept by a company or other body,

are incapable of being passed by the declaration (sub-sect. 3); so that they must be vested in the trustees in the ordinary way, *i. e.*, as to copyholds, by actual surrender and admittance; as to

except in certain cases when transfer necessary.

mortgages, by conveyance of the legal estate, and as to shares, &c., according to the mode of transfer applicable in each particular case, and where these ordinary modes are not applicable (*e. g.*, if a new trustee is appointed to take the place of a trustee who has become, by reason of his lunacy, incapable of acting, and joining in the necessary transfer) a vesting order from the court must be obtained under the provisions of Part III. of the Trustee Act, 1893.

3rd. The section only applies to deeds of appointment of new trustees executed *after* the 31st December, 1881. (Sub-sect. 5.)

Declaration not compulsory, and conveyance may always be used.

4th. The use of this declaration is not compulsory, *i. e.*, it is still in the power of the appointor to vest the property in the new and continuing trustees by the old method of conveyance to them thereof. In ordinary cases, there seems to be little advantage in using the declaration instead of the usual conveyance or assignment to vest the property in the trustees. But in those cases where it is doubtful who has the legal estate, or the legal estate is vested in an infant or a lunatic or person of unsound mind, or in fact in any of the cases mentioned in Part III. of the Trustee Act, 1893, in these cases the declaration will prove most beneficial, as it will enable the person appointing new trustees to vest the trust property in them without the inconvenience and expense of applying to the court for a vesting order under that act. (*Re Hodgett; Re Harvey's Trusts.*)

5th. A declaration is also, by sub-sect. 2, made applicable to the case of a trustee retiring under sect. 11 of the act. Here, if the declaration is made by (a) the retiring trustee, and (b) the continuing trustees, and (c) the person, if any, empowered to appoint trustees, then the declaration will operate to vest the trust property (with the exceptions before mentioned) in the *continuing trustees alone* as joint tenants.

As to the stamp on such deeds of appointment and retirement, see *post*, p. 480.

By way of conclusion to our remarks on settlements of personal property, we would remind you that as there is always a chance of some event happening to prevent a contemplated marriage taking place, the settlement should either not be executed until the marriage is actually and immediately about

to take place, or a clause should be inserted to the effect that should the marriage not take place within a year the settlement shall be *ipso facto* void. If this clause is omitted, and the settlement is executed and the marriage falls through, there would be, as long as both parties to the intended marriage were still alive, even with the assistance of the court, a great difficulty in cancelling the settlement, owing to the provisions contained in it for the benefit of the children of the marriage.

III. Strict Settlements.

The object of a strict settlement.

The object of a strict settlement is to settle the land *in specie* in such a manner that it may be enjoyed by the intended husband during his life, and at his death may devolve upon his eldest son, and that the estate may thus be kept in the family. At the same time, it has, for further objects, the providing of an income by way of pin-money for the intended wife during the life of her husband, and of a jointure for her after his death; and also the raising of portions to be paid to the younger children of the marriage. These objects were formerly only to be accomplished by a long and very complicated instrument, and though a strict settlement may now, in consequence of the Conveyancing Acts, of the Settled Land Act, 1882, and of the Trustee Act, 1893, be very much abbreviated, and is very materially simplified, yet it is an instrument which even at the present day is by no means free from complication, and must necessarily run to a considerable length. Fully to consider all the various provisions of a strict settlement, to explain them, and the reasons for their insertion, and the objects they are intended to effect, would itself occupy a volume of considerable dimensions, and cover more space than could be afforded in a general treatise on conveyancing: so that all we shall attempt to do here will be to give you a general analysis of such a settlement, and to endeavour to put before you some of the points which arise in connection with its limitations, provisions, and clauses. We shall then call your attention to some of the leading provisions of the Settled Land Acts, 1882–1890, and

Intricacy thereof.

Proposed method of dealing with the subject.

of the Settled Estates Act, 1877; and for fuller information on the subject we must refer you to some of the standard works which are specially concerned with the subject of settlements.

Generally as to the Form of a Strict Settlement.

Formerly different sets of trustees;

In old settlements you will generally find that there are four sets of trustees: two trustees who are to exercise the general powers and trusts of the settlement; two trustees who are to be the trustees of the "pin-money" term; two trustees who are to be the trustees of the "jointure" term; and two more trustees who are to be the trustees of the "portions" term. The idea in having different sets of trustees was, in the first place, that as the trustees of the general powers and trusts were more particularly concerned with the interests of the husband and of the eldest son, and as the other trustees were more particularly intrusted with the care of the interests of the wife and of the younger children, these interests were to some extent conflicting, and could not well be intrusted to the same set of persons. Another more satisfactory reason for having several sets of trustees was the danger of a merger occurring, by reason of there being vested in the same persons two or more terms, or a term and an estate of freehold limited in immediate succession. But this danger has been obviated by the 25th section of the Judicature Act, 1873, which, as you will remember, provides that there shall not be any merger by operation of law only of any estate, the beneficial interest in which would not be deemed to be merged

but not now.

or extinguished in equity. It is now the practice to have only one set of trustees; but these, as a rule, should always be at least three in number; for otherwise, on the death of one of them, the number will be reduced below two, the minimum number which, as we shall hereafter see, is contemplated by the Settled Land Act, 1882.

The limitations for pin-money, jointure, and portions.

The next point which may perhaps attract your notice will be the limitation of terms to secure the wife's pin-money and jointure and the portions for the younger children. You may perhaps ask yourself, what are these terms for? Briefly, the object of them is to make it possible to raise money for the requisite purposes without interfering with the freehold of the estate and the enjoyment of it by the tenant for life or owner for the time

being. For the insertion of the term has no deteriorating effect upon the legal seisin of the freeholder, even if it be limited so as to precede his estate. All that it gives to the person to whom the term is limited is the right to the rents and profits of the land during the term. It results, then, that if a term be vested in trustees, and, subject thereto, the estate be given to A. for life, the trustees have the power to take possession of the land during their term, but A. still gets a life estate, and will enjoy all the profits and incidents thereof unless the trustees enter into possession and take the rents and profits, as they are entitled to do, by virtue of the term of years vested in them. This being so, when it is wished, for instance, to make a provision for the payment to the intended wife of an annual sum as pin-money, it is accomplished by preceding the grant of the estate to the intended husband for life by a term for ninety-nine years, which is vested in trustees upon trust out of the rents and profits, or by the sale of timber or minerals, or by mortgage of the premises, or any of them, for all or any part of the term, to raise the annual sum required. The trustees are directed to allow the person or persons for the time being entitled in reversion immediately expectant on the term to the premises to receive the surplus of the rents and profits. Now if the tenant for life takes care that the annual sum is duly paid it will be unnecessary for the trustees to enter into possession of the premises under the term, so that the tenant for life is enabled fully to enjoy the land without disturbance. But should he neglect to see that the annual sum is paid, the trustees can at once enter and make use of their powers as owners of the term to raise it.

How the payment of pin-money is secured.

It will thus be seen that the employment of these terms is very convenient, leaving as they do the person entitled to the freehold interest in the land the full power to have uninterrupted enjoyment of the land, while at the same time they afford ample security that the sums intended to be secured by them shall be duly paid. It is not now necessary to insert a proviso for the cesser of the term upon the objects for which it was created being satisfied; for, by 8 & 9 Vict. c. 112, every term of years becoming satisfied after the 31st December, 1845, will, immediately on becoming attendant upon the inheritance, absolutely cease and determine.

Proviso for cesser of term now unnecessary.

Usual limitations of a strict settlement.

We now proceed to set out an analysis of the usual limitations and clauses and provisions of a strict settlement, as it would have been framed prior to the coming into operation of the Conveyancing Acts, of the Married Women's Property Act, 1882, of the Settled Land Act, 1882, and the Trustee Act, 1893, and we will, in the course of our remarks upon it, point out which clauses, &c. have been affected, and which have been rendered unnecessary by those enactments.

(i) To trustees till marriage;

Presuming that the property which is to be settled comes from the intended husband, and that he is seised in fee, the first limitation in the settlement will be to the trustees and their heirs, to the use of the husband and his heirs until the intended marriage. Upon this limitation we need offer no additional remarks to those which we have made in a previous page with regard to the corresponding limitation in a settlement of personalty. (*Ante*, p. 400.) We may, however, just remind you that in describing the parcels, the "general words" and the "all the estate" clause can now be omitted in view of the provisions of the Conveyancing Act, 1881, and that also, in pursuance of the same act, the "heirs" of the trustees need not be specified, but the conveyance can be made to them "in fee simple."

(ii) after the marriage to trustees for pin-money;
(iii) then for husband for life;
(iv) then for jointure for wife;
(v) then to sons in tail male, subject to portions;
(vi) then to sons in tail general;
(vii) then to daughters, with cross-remainders over;
(viii) declarations as to trusts;
(ix) powers

After the solemnization of the marriage, the trustees will hold the property to the use of the trustees for ninety-nine years (the pin-money term); then to the use of the husband for life; then to the use that the wife shall receive an annuity for her jointure; then to the use of the trustees for 200 years (the jointure term); then to the use of the trustees for 1,000 years (the portions term); then to the use of the sons of the marriage successively in tail male; then to the use of the sons successively in tail; then to the use of the daughters of the marriage as tenants in common in tail, with cross-remainders between them; and finally, to the use of the intended husband, his heirs and assigns for ever. Following the limitations come the declaration of the trusts upon which the pin-money, the jointure, and the portions terms respectively, are to be held, and then would follow the various powers which were intended to be exercised by the tenant for life, such as powers to jointure a future wife, to charge portions for the children of a future marriage, to

lease and sell, and, where necessary, to enfranchise, and to grant licences to copyholders. Then there would be a trustees' receipt clause, a power to appoint new trustees, a trustees' indemnity and reimbursement clause, clauses which, as we have seen, may now be omitted owing to the provisions of the Trustee Act, 1893, and the settlement would conclude with the settlor's covenants for title.

to the tenant for life; (x) trustees' clauses; (xi) settlor's covenants for title.

The object of the pin-money term is to provide an income for the wife during the joint lives of herself and her husband for her private expenses. As the charge which it is meant to secure is payable during the life of the husband, this term is limited so as to take effect prior to his life estate; so that he only holds that estate subject to the term. The consequence is, that if the annuity is not paid to the wife, the trustees can enter under their term during his lifetime and raise the money charged. The trusts of this term are declared to be to raise an annuity of a specified amount during the joint lives of the husband and wife, and to pay it to the wife as pin-money, and without power of anticipation. It was formerly the practice to state that this annuity was to be deemed "accruing from day to day." But the necessity of expressly stating that it should be so payable was done away with by the Apportionment Act, 1870, which provides that, *inter alia*, all annuities and other periodical payments in the nature of income shall, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly.

The pin-money provision; usually secured by creation of term;

Instead of limiting a term to trustees to secure the payment of the pin-money, it may be more convenient to give the wife a rent-charge during the joint lives of herself and her husband, annexing to it a proviso restraining anticipation. For in the limiting of such a charge there is involved much less complication than in the limiting of a term according to the old practice; and since the Conveyancing Act, 1881, the grantee of a rent-charge is endowed with ample powers for procuring the payment of the charge, which powers need not be expressly set out in the settlement. For by sect. 44 of that act it is provided, that any person entitled under an instrument coming into operation after 1881 to receive any annual sum out of land, whether charged on the land or on the income of the land, and whether by way of

but can be secured by rent-charge.

Remedies for unpaid rent-charge.

rent-charge or otherwise, not being rent incident to a reversion, shall have, subject to all prior interests, a power to distrain on the land for the charge, whenever it is in arrear for twenty-one days; and if the sum is in arrear for forty days, then (although no legal demand has been made for payment) such person may enter into possession of the land and take the income thereof until thereby or otherwise the annual sum and all the arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment, are fully paid; and such possession, when taken, will be without impeachment of waste.

The same section gives the further power, when the annual sum is forty days in arrear, whether taking possession or not, by deed to demise the land charged or any part thereof to trustees for a term of years, with or without impeachment of waste, upon trust (a) by mortgage; (b) by sale; (c) by demise for all or any part of the term; or (d) by receipt of the income of the land; or (e) by all or any of the above means; or (f) by *any other* reasonable means, to raise and pay the annual sum and arrears and the costs and expenses incurred by the non-payment thereof (including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed).

As to the court's power to order real estate charged with an annuity to be mortgaged to pay off arrears, see *Tucker* v. *Tucker*.

The life estate of the settlor.

With reference to the life estate given to the husband, we shall see, when we come to consider the provisions of the Settled Land Act, 1882, what extensive powers of dealing with the property that act confers on him. The estate of the husband is usually given to him "without impeachment of waste." This will enable him to commit all kinds of waste, except such as a court of equity would restrain. (See Judicature Act, 1873, s. 25.) If the husband as tenant for life is left impeachable for waste, he will not be at liberty to cut down timber, except for thinning purposes, and for the repair of houses or fences, and implements of husbandry; or unless the estate is a "timber" estate (*Dashwood* v. *Magniac*); and if he wrongfully cuts down timber the produce will be directed to be invested and accumulated for the benefit of the first estate of inheritance. But now, under

Usually given without impeachment for waste.

sect. 35 of the Settled Land Act, 1882, even when impeachable for waste, he may cut timber ripe and fit for cutting and sell the same; but he must first obtain the consent of the trustees or the leave of the court, and three-fourths of the net proceeds of the sale will have to be set aside as "capital money" under the act, and the other fourth goes as rents and profits. If, however, the tenant for life is "without impeachment for waste" he may, irrespective of the Settled Land Act, 1882, cut down timber (except ornamental timber) (see hereon *Baker* v. *Sebright*, and *Stafford* v. *Sutherland*) and convert it to his own use. As to the working of mines, he may not, if impeachable for waste, open new mines, but he may work open ones. Special provisions allowing him to make mining leases are conferred by the Settled Land Act. He is generally, though impeachable, not liable for mere permissive waste, *e. g.*, the allowing of the premises to fall into disrepair, the Statute of Marlbridge not applying, unless he has expressly contracted to keep them in repair. (See *Woodhouse* v. *Walker*; *Barnes* v. *Dowling*; *Avis* v. *Newman*, *Re Cartright*.) So that if it is the intention that he should keep the premises in repair, a clause to that effect should be contained in the settlement. As to the general rights of a tenant for life to commit waste, see *Lewis Bowles' Case*.

If impeachable for waste may cut timber under the Settled Land Act, 1882.

As to mines.

As to repairs, not liable for permissive waste.

After the life estate to the husband comes the limitation to the wife of an annuity secured by powers of entry and distress for her jointure. This was expressed to be in bar of her dower or freebench, and the power of distress was given to her in the event of the jointure being in arrear for twenty-one days, and a power of entry was conferred in the event of its being in arrear for forty days. You will observe that the jointure was secured collaterally by a term vested in the trustees, which was limited so as to come into effect after the husband's life estate, as the jointure would not require to be raised till that estate had determined by his death. The reason for giving this additional security was, that the power of distress could not be exercised over lands which were in the occupation of persons holding under leases created before the settlement, or created subsequently under powers to grant leases contained in the settlement; for the title of such lessees was paramount to the rent-charge. But if a term was vested in trustees, they could require

The jointure provision:

usually secured by a term;

these lessees to pay their rent to them, because a lessee must pay his rent to the legal reversioner, and the trustees would be in that position; for as to leases created prior to the settlement, they would be assignees of the reversion expectant on the determination of them; and as to leases created since then, they would be the reversioners expectant on them.

but can now be secured by a rent-charge.

But, as we saw was the case with the pin-money term, so with the jointure term, it will in future be unnecessary to make use of it, in consequence of the powers given to the grantees of rent-charges by the 44th section of the Conveyancing Act, 1881; and, by virtue of the same section, it will further be unnecessary in future to insert express powers of distress and re-entry.

Portions for the younger children; must be secured by creation of a term.

Following the jointure term comes the term for securing the portions for the younger children of the marriage. This term is usually a long period of years, in most cases consisting of 1,000 years. It will still be necessary to make use of this method of securing portions. For these are not, like pin-money and jointure, mere annuities; but they are "lump sums" of money payable to the children of the marriage upon their attaining a certain age; and a mere rent-charge, with its attendant powers of distress, entry, and power to create and deal with a term, would not in this case answer the purposes required. The money required to discharge the portions will be, as a rule, most conveniently raised by mortgage, and it is with this object that the term is given to the trustees, and for this reason that it is made of so great a length; for it is evident that a short term would not constitute a good mortgage security, and would not encourage persons to advance money on the mortgage of it. Notice, also, that the portion term follows the life estate given to the intended husband, and precedes the estate in tail limited to the eldest son of the marriage. The result of this is that the eldest son takes his estate tail subject to the portions to the younger children, and accordingly he cannot, by disentailing his estate, get rid of the charge of the portions, since they are prior to that estate. In a subsequent part of the settlement it is provided that the land settled shall stand charged with a certain sum (reducible as thereinafter provided) for the portions of the children, who, being younger sons, shall attain the age of twenty-one, or, being daughters, shall attain that age or marry

The term is not extinguished by disentailment.

Portions for younger children.

under that age. Then the meaning of the term "younger sons" is defined, so as to include every son not being at his birth, or becoming during his minority, an eldest or only son entitled for the time being under the settlement to an estate tail in the premises in possession or remainder immediately expectant on the decease of the tenant for life. Then it is provided that the portion money shall be divided among the children in such shares as the intended husband shall by deed or will appoint, and in default of appointment among them in equal shares, the portion of each child who attains a vested interest therein after the death of the tenant for life to be payable on the vesting thereof, and the portion of each child who attains a vested interest during the lifetime of the tenant for life to be payable on the decease of the tenant for life. It is then provided that any child who has his portion appointed to him shall not be entitled to any share in the unappointed part, without bringing such share into hotchpot.

"Younger sons."

Division of portion money.

Hotchpot clause.

Then follow provisions for the reduction of the original amount of the charge. It is generally stipulated that if only one child, being a younger son, shall attain twenty-one years, such child shall have only a smaller sum as a portion than the sum originally specified as the total amount of the portion fund; and if two children and no more shall attain twenty-one, then the portion fund which they will share is also reduced from the original amount, but is made larger in amount than that which is to be paid in case there is only one child. Then with regard to the excess of the original sum over the amounts payable respectively, when there is only one, or two younger children to share the portions, it is provided that it shall sink into the hereditaments, and cease to be charged thereon.

Reduction of charge.

The trusts of the portions term are declared to be, that the trustees shall by mortgage thereof, or by or out of the rents and profits thereof, or by any other reasonable ways and means, raise the money to which any child or children shall become entitled for a portion as and when the same becomes payable, with the costs and expenses of the execution of the trust, and further, that so long as any portion which has become payable remains unpaid, the trustees shall out of the rents and profits of the hereditaments, or by any other reasonable ways or means, raise

The trusts of the portions term.

interest thereon; and further, that if at the decease of the intended husband any child entitled in expectancy to a portion is under the age of twenty-one, and, being a daughter, is unmarried, the trustees shall, with and out of the profits of the hereditaments, or by any other reasonable ways or means, raise such annual sum for the maintenance and education of each such minor, as they think fit; and further that, subject to the above trusts, and to the power of advancement next thereinafter contained, the trustees shall permit the rents and profits of the hereditaments to be received by the person for the time being entitled thereto in remainder immediately expectant on the term. Then the trustees are empowered to raise a moiety of the presumptive shares of the sons, for their advancement, preferment, or benefit, at the request of the intended husband during his life, and after his decease, at their own discretion, the money so raised to be reckoned as part of the share of such son, if he should attain the age of twenty-one.

Who are "younger sons."

The first point which may strike you in connection with the above provisions is the question, Who is to be deemed a younger son? The object in giving the portions is, of course, to provide for those children of the marriage who do not get any interest in the land itself, and who would thus be otherwise unprovided for. It is not the intention to give the son who takes the land a portion as well as the estate. But it may happen that one who is literally a younger son at the time when younger sons become entitled to portions, may by the death of his elder brother become entitled to step into that brother's shoes, and take his interest in the land. Is he in such a case to be entitled to a portion as well? Evidently this is not the intention, and the general rule is, that in a provision for the raising of portions, when it is made by a parent or person standing *in loco parentis*, the term "a younger child" does not bear its literal meaning, but means any one of the children exclusive of the one who takes the family estate. To avoid any difficulties in this respect, it is usual in the settlement to define the children who are to be entitled to portions, and these are generally stated to be the children of the intended marriage, "other than an eldest or an only son, for the time being entitled, under the settlement, to an estate tail in possession, or in remainder expectant on the

Generally defined by the settlement.

death of the tenant for life." But even with a clause of so explicit a nature difficulties occur. If an eldest son dies without issue before the time when the portions become distributable, the second son will then become the eldest son, and as he then gets the settled estates, he will be excluded from a share in the portions. (See *Re Bayley's Settlement.*) But it has been held, that if the eldest son has before his death executed a disentailing deed which prevents the second son from taking the settled estate, that second son will not be excluded from a share in the portions, even though he may take the property under a re-settlement. (See *Macoubrey* v. *Jones.*) And in *Ellison* v. *Thomas* it was decided, that if an eldest son dies before his estate tail falls into possession, without leaving inheritable issue, and without his having disentailed, his representatives will, under the description of younger children, or rather as the representatives of a younger child, take a share in the portions. The question is in these cases, When is the character of a "younger son" to be ascertained? This should be fixed by the settlement, and it is advisable to provide that the character shall be deemed ascertained at the time the son attains twenty-one, and so becomes entitled to a vested share in his portion. The result will be that an eldest son, on attaining twenty-one, will be excluded from a portion in every case, while a second son, who is still a younger son when he attains twenty-one, will not be deprived of his portion by the subsequent death of his elder brother. This plan will enable a second son, should he marry during his elder brother's lifetime, to make a certain provision for his wife and children, and one which is not liable to be defeated by the loss of his portion in consequence of his afterwards becoming an eldest son. If the settlement is silent on the point, the period of distribution, not that of vesting, will be the time for ascertaining the character. Thus, where A. bequeathed funds to B. for life, and after his death to his children, except an eldest son, it was held the period for ascertaining who was an eldest son was the period of distribution, not A.'s death. (*Matthews* v. *Paul.*)

Illustrative cases.

When the "younger son" is to be ascertained.

The time for payment of the portions is not until after the death of the intended husband, although the children may obtain vested interests therein during his lifetime. Sometimes power

Portions are paid on husband's death.

is given to the father (the tenant for life) to require the portions to be raised and paid during his lifetime. Sometimes, too, an express power is given to the owner of the estate for the time being to have the total sum, designated as the portion fund, raised as soon as the first portion becomes payable, so that the trustees need not be obliged to make as many mortgages of the term as there are portions. It is doubtful if, in the absence of express provision, the whole of the portions could be raised at once. (See *Sheppard* v. *Wilson*.)

As to lapsing of portions.

As to when portions charged on land and payable on certain events are or are not to be raised should the person die before the event happen, you must refer to the leading case of *Pawlett* v. *Pawlett*. The general rule is, that if the event be personal to the person to be benefited, *e. g.*, on his attaining twenty-one, and he die before the event happen, the portion is not to be raised out of the land; but if the payment is postponed to the happening of an event not referable to the person to be benefited, but to the circumstances of the estate out of which the portion is to be raised, it will be raisable after the death of the tenant for life, though the term out of which it was to be raised had not arisen during the life of the person to be benefited owing to his death during the life of the tenant for life. (*Evans* v. *Scott*.)

Hotchpot, advancement, and maintenance clauses.

As the settlement as to the portion is, in reality, a settlement of personal property, the hotchpot, advancement, and maintenance clauses, which we have already discussed, should be inserted.

The uses in strict settlement:

(a) To the sons;

With reference to the estate tail conferred on the eldest and other sons successively, it is not now necessary to use the words "heirs of the body," but the estate can be limited to such son and sons under the expression "in tail." (Conveyancing Act, 1881, s. 51.) Further, though the estate of the tenant in tail under the settlement is a contingent remainder, and formerly it would have been necessary to have had trustees to support such contingent remainder, this is now no longer necessary, as by 40 & 41 Vict. c. 33, every contingent remainder created by any instrument executed after that act which would have been valid as a springing or shifting use or executory devise or other limitation, had it not had a sufficient estate to support it as a

contingent remainder, will, if the particular estate determines before the remainder vests, be capable of taking effect just as if it had originally been created as a springing or shifting use, &c.

(b) To the daughters.

The estate tail to the daughters, you will observe, is given to them with "cross remainders between them." This needs some explanation. The limitation in full runs as follows:—"To the use of the daughters and the heirs of their respective bodies in equal shares as tenants in common. And if and so often as there shall be a failure of issue of such daughter, then as well as to her original share as also to the share or shares which shall have accrued to her or the heirs of her body by this present limitation, to the use of the others of such daughters and the heirs of their respective bodies in equal shares as tenants in common. And if there shall be a failure of issue of all such daughters but one, or if there shall be but one such daughter, then as to the entirety of the premises to the use of such one or only daughter and the heirs of her body." The effect of this limitation is, that on the death of any daughter, and the failure of the issue of her body, both her original share and any share which she or her issue may have taken will be divided equally among the other daughters in tail.

Settlement of chattels.

It may be desired that leaseholds or chattels shall be settled so as to go with the freeholds so long as the law allows. Inasmuch as an estate tail in these properties cannot be created, they must be limited to the same uses, as nearly as possible, as the freeholds, with a proviso that no tenant in tail *by purchase* (*i. e.*, one taking immediately under the settlement, and not through some person who took under the settlement) shall become absolutely entitled to the leaseholds or chattels until he attains twenty-one. The words "by purchase" are introduced to prevent the rule against perpetuities being offended. Under such a limitation, on attaining twenty-one, but not before, the eldest son will become absolutely entitled to the leaseholds and chattels.

Trustee clauses.

Before 1882 it was generally the practice to give the trustees, during the minority of an infant tenant for life, or tenant in tail *by purchase* (*vide supra*), power to enter upon the estate and to manage it, such power directing them to pay all outgoings and moneys necessary for the maintenance of the infant, and to accumulate the residue of the income for the infant's benefit,

Reason of restricting trust for accumulation to tenant in tail by purchase.

should he attain the age of twenty-one. The reason of restricting the trust for accumulation to the minorities of infant tenants in tail *by purchase* was, that, if it was framed so as to include tenants in tail in general, it would be void as infringing the perpetuity rule. But under a trust for a tenant in tail *by purchase*, the *cestui que trust* will be one who takes by the direct limitation in the settlement, and accordingly must attain twenty-one within the life in being and twenty-one years after.

The accumulation rule.

Accumulation is, as you are aware, further restricted by the Thellusson Act (39 & 40 Geo. 3, c. 98) to one of the following periods:—(1) The life of the settlor; (2) the term of twenty-one years from his death; (3) during the minority or respective minorities of any person or persons who shall be living or *en ventre sa mère* at the death of the settlor; (4) during the minority or respective minorities of any person or persons who, if of full age, would be entitled to the rents and income directed to be accumulated. Under this statute a trust for accumulation which offends against the perpetuity rule will be void altogether (*Boughton* v. *James*); but if it is within that rule, and only exceeds one of the periods allowed by the statute, it will only be void *pro tanto*. (*Griffiths* v. *Vere*.) In *Longden* v. *Simson* accumulation was directed until legatees not then born attained twenty-one, and it was held that the direction to accumulate was good for twenty-one years only from the testator's death. It will be seen, therefore, that the alternative periods, in lieu of the grantor's, &c. life, are each, in effect, twenty-one years. The power of accumulating income has been further curtailed by the Accumulations Act, 1892, whereby it is in effect enacted that where the object of accumulating income is that lands may be purchased, the accumulation can only be for the last of the four periods mentioned in the Thellusson Act, namely, the minority of the person who, if of full age, would be entitled to the income directed to be accumulated (53 & 54 Vict. c. 58).

Provisions of Conveyancing Act make management and accumulation clauses unnecessary.

The management and accumulation clauses may now, however, be omitted in reliance on sect. 42 of the Conveyancing Act, 1881, which enables the following persons to enter into and continue in possession of the infant's land: The trustees, if any, appointed *for the purpose* by the settlement; if no such trustees

are appointed, then the trustees with power of sale of the settled land, or with power of consent to or approval of the exercise of such power of sale; or, if none, then any person appointed as trustee for this purpose by the court on the application of the guardian or next friend of the infant.

The powers of a trustee who has entered are as follows:—

Statutory powers of trustees.

1. To manage or superintend the management of the land.

2. To fell timber or cut underwood from time to time in the usual course, for sale or for repairs or otherwise.

3. To erect, pull down, rebuild and repair houses and other buildings and erections.

4. To continue the working of mines which have usually been worked.

5. To drain or otherwise improve the land, or any part thereof.

6. To insure against loss by fire.

7. To make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies.

8. Generally to deal with the land in a proper and due course of management; but so that where the infant is impeachable for waste the trustees shall not commit waste, and shall cut timber on the same terms only and subject to the same restrictions on and subject to which the infant could, if of full age, cut the same.

Application of income.

9. Out of the income of the land (including the produce of the sale of timber and underwood) to pay the expenses of management and all outgoings not payable by any tenant or other person, and to keep down any annual sum and the interest of any principal sum charged on the land.

10. Power to apply at their discretion any income which they deem proper for the infant's maintenance, education, or benefit.

11. To invest the residue in the securities authorized by the settlement or by law, with power to vary investments, and to accumulate the income of the investments at compound interest,

and stand possessed of the accumulated income on the trusts following, *i. e.* :—

(a) If the infant attains twenty-one years, then in trust for the infant;

(b) If the infant is a woman and marries while an infant, then in trust for her separate use;

(c) If the infant dies while an infant, and, being a woman, without having been married, then where the infant was, under a settlement, a *tenant for life*, or *by purchase tenant in tail*, upon the trusts, if any, declared of the accumulated fund in the settlement; and where no such trusts are declared, or the infant has taken the land *by descent*, and not by purchase, or is a *tenant in fee simple* of the land, then in trust for the infant's *personal representatives as personal estate.*

By sub-sect. 6, it is provided that where the infant's estate or interest is in an *undivided share in land*, the trustees may exercise the powers given by the section jointly with persons entitled to the other undivided share or shares. This empowers trustees to manage the estate of an infant where it consists only of an undivided share in land, *e.g.*, where the infant is one of a class.

These powers apply when the instrument under which the infant's interest arises comes into operation after the commencement of the act, *i.e.*, after the 31st December, 1881, and may be excluded or varied by the instrument. (See *Re Duke of Newcastle.*)

Certain powers need not now be given to the trustees.

As to the power to lease, this need not now be expressly inserted in the settlement; for the tenant for life has sufficient powers for that purpose conferred on him both by the Settled Estates Act, 1877, and the Settled Land Act, 1882. (See *ante*, p. 331.) The power to grant licences to copyholders may also now be omitted in reliance on sect. 14 of the Settled Land Act, 1882. The power to enfranchise copyholds, to sell and exchange, may also be omitted in consequence of the same act (sect. 3 (ii)); and the general powers of sale, &c., given under certain circumstances by the act to the tenant for life, may be in future relied on. Of the receipt clause, the trustee's indemnity and reim-

bursement clauses, as well as of the covenants for title by the settlor, we have already spoken.

The Settled Land Acts.

The Settled Land Act, 1882, as amended by subsequent statutes.

We must now refer to the Settled Land Act, 1882; this act (which has been amended by acts passed in 1884, 1887, 1889, and 1890) does not repeal the Settled Estates Act, 1877 (with the exception of sect. 17 thereof), but it practically supersedes it, so that it will be convenient to consider its provisions first.

What is a "settlement."

A "settlement" within the act will include not only what is generally understood by a marriage settlement, but any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument, or any number of instruments, made or passed before or after, or partly before and partly after, the act, under or by virtue of which land, or any estate or interest therein, is limited to or in trust for any persons by way of succession. A will and settlement referred to therein may constitute one settlement within the act (*Re Munday's Settled Estates*); and where one settlement flows out of another, as in the case of a settlement on A. for life, with remainder to B. in tail, and then the entail being barred by A. and B. by a disentailing deed, the lands are settled, subject to the charges of the prior settlement, on B. for life, with remainders over, the two settlements are read as one compound settlement for the purposes of the Settled Land Act. (*In re Marquis of Aylesbury and Lord Iveagh.*) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is a settled estate under the Settled Land Act; and any estate or interest therein which is the subject of a settlement is "settled land." A hereditary title or dignity is an incorporeal hereditament within sect. 2 (10) of the act, so that the holder of such a title may by leave of the court sell the quasi-heirlooms which devolve with the title or dignity. (*Re Rivett-Carnac.*)

Who is a tenant for life.

The act defines a tenant for life as a person who is for the time being under a settlement beneficially entitled to possession of the settled land for his life, and provides that, if there are two or more persons so entitled as tenants in common or joint tenants, or for concurrent interests, they together constitute the

tenant for life; and further, such person or persons will remain tenant or tenants for life, notwithstanding that the settled land is encumbered or charged in any manner or to any extent. When two or more persons constitute together the complex tenant for life, the consent of one, when consent is required by the act, will be sufficient (Settled Land Act, 1884, s. 6 (2)), but subject to this exception the powers conferred by the act must be exercised by the complex tenant for life, even when they are tenants in common, and one merely wishes to deal with his share under the acts. At least, so it would appear from *Re Collinge's Settlement*, a decision which appears to be in conflict with section 19 of the 1882 Act. Now the act gives certain powers to a tenant for life, and in sect. 58 it provides that each of the following persons shall, when their estates or interests are in possession, have the powers of a tenant for life under the act, just as if they were tenants for life defined thereby.

Limited owners who are to be deemed to fall within the definition.

(i.) A tenant in tail, including a tenant in tail who is by act of parliament restrained from barring or defeating his estate tail, and although the reversion is in the crown, and so that the exercise by him of his powers under this act shall bind the crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by parliament in consideration of public services. (Note that under the 55th section of the Settled Estates Act, 1877, a tenant in tail so restrained by any act of parliament was debarred from applying for an order for sale under that act.)

(ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event:

(iii.) A person entitled to a base fee, although the reversion is in the crown, and so that the exercise by him of his powers under this act shall bind the crown (see *In re Morshead's Settled Estate*):

(iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (see *In re Hazle's Settled Estates*):

(v.) A tenant for the life of another, not holding merely under a lease at a rent:

(vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise (see *Re Paget's Settled Estates*), or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose:

(vii.) A tenant in tail after possibility of issue extinct:

(viii.) A tenant by the curtesy (as to the estate of a tenant by the curtesy, the Settled Land Act, 1884, provides that it shall be deemed an estate arising under a settlement made by his wife). (See hereon *Moggridge* v. *Clapp*):

(ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event. Under this sub-section it has been held that where lands were demised to trustees for A. for life, but on certain trusts, *i. e.*, to keep down interest, pay an annuity, manage the estate, &c., the balance only going to A., with remainders over on his death, and the whole of the income was exhausted by the expenses, &c., A. was still a tenant for life though he had no actual beneficial interest, and could exercise the powers given to tenants for life. (*Re Jones' Estate.*) Note, lastly, that while a tenant *in dower* is expressly referred to in the Settled Estates Act, 1877, there is no reference to such a tenant in the Settled Land Acts, 1882 to 1890.

Infants are also within the definition.

Besides this, sect. 59 provides that where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof.

It was held in *Re Atherton* that a person who was an heir-at-law, and as such became entitled for his life to a lapsed devise, was a tenant for life within the act.

As to the exercise of powers conferred on a tenant for life—

With regard to the exercise of the powers conferred on the tenant for life, the act makes special provisions to meet the several cases of the tenant for life being an infant, a married woman, or a lunatic. These provisions are as follows:

(i) When an infant;

Where a tenant for life, or a person having the powers of a tenant for life under this act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement, and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders. (Sect. 60.)

(ii) When a married woman;

With regard to married women, it is provided, by sect. 61, as follows:

(1.) Where a married woman who, if she had not been a married woman, would have been a tenant for life or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a *feme sole*, then she, without her husband, shall have the powers of a tenant for life under this act.

(2.) Where she is entitled otherwise than as aforesaid, then she and her husband together shall have the powers of a tenant for life under this act.

(3.) The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together.

(4.) The married woman may execute all deeds and do all things necessary to give effect to the provisions of the section.

(5.) A restraint on anticipation in the settlement is not to prevent the exercise by her of any power under the act.

(iii) When a lunatic.

By sect. 62, where a tenant for life, or a person having the powers of a tenant for life under this act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person intrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this

act; and the order may be made on the petition of any person interested in the settled land, or of the committee of the estate. Notice must be given to the trustees. (*Re Taylor.*) If a tenant for life has not been found a lunatic by inquisition, and so has no committee, it is necessary that an inquisition should be held, and a committee appointed, since no one else can exercise the statutory powers. (See *In re Baggs.*) Under this section the court may authorize a sale of a lunatic's share in settled land to be made to the owner of the other share in such land. (*Re Gaitskell.*)

Who are trustees for the purposes of the act.

Trustees under the act include the persons, if any, who are for the time being, under a settlement, trustees with power of sale of the settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act, are, for the purposes of this act, trustees of the settlement (sect. 2, sub-sect. 8). Where there are no express trustees, the following persons will be trustees:—(1) persons for the time being under the settlement, trustees with power of sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power to consent to the exercise of such a power of sale. (2) (If there are no such persons) the persons who are for the time being under the settlement trustees with a future power of sale, or under a future trust for sale of the land to be sold, or with power to consent to the exercise of such future power of sale, whether the power or trust takes effect in all events or not. (Settled Land Act, 1890, s. 16.)

The powers of a tenant for life.

Next, we are to inquire what powers are given by the Act to tenants for life. These are powers to sell, to enfranchise, to exchange, to make partitions, to transfer incumbrances of the land sold to other parts of the settled land, to grant leases, to surrender and grant new leases, to grant licences to copyholders to lease, to dedicate land for streets and open spaces, &c., to make certain improvements on the land, to enter into contracts, to lease, sell, exchange, make partitions, mortgage or charge, &c., to sell timber in certain cases, &c.

Cannot be assigned.

By sect. 50 (1), these powers are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exercisable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement; so that neither a purchaser of the life estate nor the trustee in bankruptcy of the tenant for life could exercise the powers. (See *In re Mansel's Settled Estates.*) The position of a tenant for life who has assigned his interest in regard to the exercise of the statutory powers has been modified by sect. 4 of the Settled Land Act, 1890, which enables a tenant for life who has dealt with his life interest by way of marriage settlement or family arrangement to exercise the statutory powers; for the assignment of his interest is in this case to be deemed one of the instruments creating the settlement, and not an assignment within sect. 50.

Contract not to exercise invalid;

(2) A contract by a tenant for life not to exercise any of his powers under this act is void. A tenant for life can sell, though the estate is being administered by the court. (*Cardigan* v. *Curzon-Howe.*)

except that assignee for value not to be prejudiced.

(3) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent (see *Marquis of Aylesbury* v. *Lord Iveagh*, where a tenant for life, having charged his life interest with a rent in favour of his wife, sold the property under the acts, and the court held that the purchaser was entitled to rescind the contract unless the incumbrancer could release her charge), except that, unless the assignee is actually in possession of the settled land, or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this act.

What assignments included, and meaning of term.

(4) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this act; and in this section assignment includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and

assignee has a meaning corresponding with that of assignment.

Tenant for life cannot be prohibited from exercising his powers.

Sect. 51 prevents the tenant for life being prohibited from exercising the powers conferred by the act; and for the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power, shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same. By sect. 52, notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this act shall not occasion a forfeiture. In connection with these provisions, it has been held that a gift over on ceasing to reside in a particular house on the settled estate may be defeated by an exercise of the statutory power of sale (*Re Paget's Settled Estates*), though such a condition is good, and obliges the tenant for life to so reside until the house is sold. (*Re Haynes; Kemp* v. *Haynes;* and see *Ames* v. *Ames.*) A tenant for life may, by the leave of the court, sell settled chattels, even although the trustees have an express power to do so. (*Re Houghton Hall Estate.*)

Nor does the exercise of any power work a forfeiture.

Tenant for life is in the position of trustee.

A tenant for life, in exercising any power under this act, is, by sect. 53, to have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties. (See *Re Earl of Berkeley's Will; Hampden* v. *Buckingham;* and *Sutherland* v. *Sutherland.*)

Purchasers, &c. are deemed to give the best price.

Sect. 54 provides that on a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life, shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could be reasonably obtained by the tenant for life, and to have complied with all the requisitions of the act.

Tenant for life and trustee possess

Sect. 55 provides that where a tenant for life or the trustees of the settlement exercise the various powers given to them by

power to execute all necessary deeds.

the act, they may execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

Powers in settlement are cumulative.

Sect. 56 provides that nothing in the act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement or by statute or otherwise, exercisable by a tenant for life or by trustees with his consent or on his request or by his direction or otherwise; and that the powers given by the act are cumulative; but in case there is any conflict between the provisions of a settlement and those of the act as to such powers, the provisions of the act are to prevail (*vide Re Houghton Hall Estate*); so that, notwithstanding anything in the settlement, the consent of the tenant for life will be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement, exercisable for any purpose provided by the act. (By the Settled Land Act, 1884 (s. 6, sub-s. 2), it is provided, that where several persons form together the complex tenant for life, the consent of any one of those persons to the exercise of any power by the trustees of the settlement shall be sufficient.) The court, on the application of the trustees or the tenant for life, is empowered to give its decision, opinion, advice, or direction if any question arises, or doubt is entertained, respecting any matter within the section.

Settlements may confer additional powers.

By sect. 57, nothing in the act is to preclude a settlor from conferring on the tenant for life, or the trustees, any powers additional to, or larger than, those conferred by the act; and any such powers so conferred will, in spite of the act, operate and be exercisable just as if they were conferred by the act, unless a contrary intention is expressed in the settlement.

The power to sell, &c.

Let us now glance at the particular powers conferred by the act more in detail. First, as to the power given to the tenant for life, in spite of his being merely a limited owner, to sell the fee in the land, or to exchange or make a partition of it.

Sect. 3 provides that the tenant for life may sell the settled land or any part thereof; may sell the seigniory of a manor or the freehold or inheritance of any copyhold land, reserving the

minerals or not, so as in every such case to effect an enfranchisement; may make an exchange of the settled land or any part thereof; but he must not exchange settled land in England for land out of England. Where the settlement comprises an undivided share in land, or the land has come to be held in undivided shares, he may concur in making a partition of the entirety.

Restrictions on the exercise of these powers.

But these powers of sale, &c. are not to be exercised without restriction. By sect. 45, before exercising his power to sell (and also before exercising his powers to exchange, make a partition, mortgage, charge or lease), the tenant for life must give notice of his intention so to do to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last-known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same. Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement. A person, it must be noticed, dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

Notice must be given to trustees;

of whom there must be two.

A general notice is sufficient.

By sect. 5 of the Settled Land Act, 1884, the notice may be a general notice: provided, however, that on the request of the trustees the tenant for life must from time to time furnish particulars as to any sales, exchanges, partitions or leases, either carried out or in progress, or immediately intended. But the trustee may, in writing, waive notice in any particular case or generally, or may accept less than a month's notice. This section applies to notices given before the act as well as those given after, unless such first-mentioned notice has been objected to before the act. The Act of 1884 does not in express terms allow the notice to the solicitor of the trustees to be dispensed with or shortened; but as the trustees can dispense with or

Length of notice.

Notice of intention to mortgage.

shorten the notice to themselves, they can, it would appear, dispense, &c. also with notice to their solicitor. It is not clear that the Act of 1884 applies to the case of a mortgage by the tenant for life, and if it does not, a month's notice is still necessary, and it must be a specific notice. (*Re Ray's Settled Estates.*) You will observe that the number of trustees to whom the notice is to be given must at least be two. Suppose there are not two trustees at the time the tenant for life wishes to exercise his power to sell, &c.; in this case he must apply to the court under sect. 38 of the act to appoint the requisite number of trustees, and the sale will be restrained until such appointment has been obtained and the proper notice has been given. (See *Wheelwright* v. *Walker.*)

Certain purposes for which the consent of trustees, &c. is required.

Generally, then, you will observe, that although the tenant for life is required to give notice, he does not, in exercising his statutory powers, require any consent from the trustees or from the remainderman, or from the court, but acts independently of them. For certain purposes, however, he must obtain leave; thus, if he wishes to sell, exchange, or lease the principal mansion, and the pleasure grounds and park and lands usually occupied therewith; but where the house is usually occupied as a farm house, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not altogether exceed twenty-five acres, the house is not to be deemed a principal mansion house for the purpose of the section (see sect. 10 of the 1890 Act; and see *Bruce* v. *The Marquis of Aylesbury*, where it was laid down that in giving or refusing consent to sell the mansion the court was to look to the whole circumstances of the case); or if, being tenant for life impeachable for waste, he wishes to cut the timber, he must obtain either the consent of the trustees or the leave of the court. (See hereon *Cardigan* v. *Curzon-Howe*, which shows that the court may give leave that the timber be cut, although the settlement makes express provision for the cutting). And if he wishes to sell chattels which are settled to go with the lands (called *quasi-heirlooms*), he must first obtain the leave of the court. (Sect. 37. See hereon *Re Houghton Hall Estate.*) The court has a discretion to allow or refuse a sale of heirlooms. (*Re The Earl of Radnor.*) On the sale of the mansion house, chattels settled to go with the

old mansion house may be removed to the new mansion house. (*Brown* v. *Collins*.)

When the land has been sold, the tenant for life is not absolutely entitled to the money paid therefor; for the consideration received will constitute "capital money," and will have to be paid to the trustees or into court, and it will then be dealt with in the manner in which the act directs capital money to be dealt with. (See *post*, p. 460.)

What becomes of the purchase-money.

The 4th section contains the following regulations as to sales, enfranchisements, exchanges and partitions:—

Regulations as to sales, enfranchisements, exchanges and partitions.

(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land, or in land and money, that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition or otherwise, on the tenant for life and the settled land, or any part thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a regrant of any right of common or other right, easement or privilege theretofore appendant or appurtenant to or held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England. England here includes Wales and Berwick-on-Tweed. (See 20 Geo. 2, c. 42, s. 3.)

(9.) On a sale (and also on an exchange or partition; Settled

Land Act, 1890, s. 5), an easement may be created over the land sold, or an easement may be given or taken in exchange or on partition for land, or for any other easement or right.

Shifting incumbrances.

Sect. 5 proceeds to provide, that where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, *with the consent of the incumbrancer*, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

Several owners.

If the land sold is an undivided share in land, the tenant for life of that undivided share may join or concur with any person entitled to or having a power or right of disposition of or over another undivided share (sect. 19), though one such tenant cannot dispose of his own share without the other's concurrence. (*Re Collings's Settlement*; sect. 2, sub-sect. 6; sect. 13.)

Tenant for life can convey the fee.

By sect. 20, the tenant for life may give effect to any sale, exchange, partition, lease, mortgage or charge he may make under the act, by conveying the land or creating the charge, &c. by deed; and such deed will pass the land conveyed, or the interest created, discharged from all the limitations, powers and provisoes of the settlement, and from all estates, interests and charges subsisting or to arise thereunder, subject to and with the exception of (i) estates, interests and charges having priority to the settlement; (ii) estates, &c. which have been conveyed or created for securing money actually raised at the date of the deed (see hereon *Marquis of Aylesbury* v. *Lord Iveagh*); and (iii) leases, grants at fee farm rents or otherwise, and grants of easements, rights of common, or other rights and privileges granted or made for value in money or money's worth, or agreed so to be before the date of the deed by the tenant for life, or any of his predecessors in title, or by any trustees for him or them under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life. With regard to copyholds, the steward is required to enrol the deed when produced to him, but he may require to be produced to him so much of the settlement as may be necessary to show the

Effect of conveyance: (i) Generally;

(ii) As to copyholds;

title of the person executing the deed, and if he thinks fit he may enter the same on the rolls. Further, these sales, exchanges and partitions, and also a mining lease, may be made, as to land, with or without a reservation or exception of mines and minerals, and as to mines and minerals alone. (Sect. 17.) From this it will be seen that the tenant for life may convey the whole interest, the subject of the settlement, without the concurrence of the trustees or of the remainderman.

(iii) As to mines.

By sect. 31, the tenant for life may contract to make any sale, exchange, partition, mortgage, or charge, and rescind or vary such contract when made, just as if he were the absolute owner of the land, except that the contract as varied must be in conformity with the act. Any consideration paid to him for varying or rescinding a contract will constitute capital money under the act. He may also contract to make a lease, and in making the lease may vary the terms, so that the lease be in conformity with the act; and he may accept a surrender of a contract for a lease, and make a new or other contract for a lease, in like manner and on the like terms in and on which he might make a new or other lease where a lease had been granted. He may also generally enter into any contract to do any act for carrying into effect any of the purposes of the act, and may vary or rescind the same. Every such contract will bind and be for the benefit of the settled land, and will be enforceable by and against every successor in title for the time being of the tenant for life, and may be carried into effect by such successor, but so that it may be varied or rescinded by such successor just as if it had been made by himself (see *Moggridge* v. *Clapp*). The court may give directions as to the enforcing, carrying into effect, varying, or rescinding any such contract. A tenant for life may make any conveyance necessary or proper for giving effect to a contract entered into by a predecessor in title, and which, if made by such predecessor, would have been valid as against his successors in title.

Contracts by tenant for life.

Effect thereof.

Lastly, to facilitate sales to and from the tenant for life himself, it is enacted by the Act of 1890 that "where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled

Sales to the tenant for life himself.

land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction."

Leases, surrenders, renewals, &c. of leases.

By virtue of sect. 7 of the Settled Land Act, 1890, a lease for not exceeding twenty-one years, at the best rent, without fine, and whereof the lessee is not exempted from punishment for waste, may now be made without any notice to the trustees, and notwithstanding there are no trustees of the settlement; and in this case the lease need not be by deed if the term does not exceed three years. But in general the tenant for life must give notice to the trustees of his intention to lease, and otherwise observe the same preliminaries as he is required to observe previous to making a sale. Further, sect. 6 imposes restrictions as to the length of the term for which the lease may be granted, &c. These restrictions and regulations are as follows:—The lease may be granted of the land, or of any easement, right, or privilege over the same, for any purpose whatever, whether involving waste or not, for any term not exceeding ninety-nine years for a building lease, sixty for a mining lease, and twenty-one for any other kind of lease. But—

As to leases.

Regulations to be observed: (i) Generally;

(1) Every lease (except a lease for three years or less within the Act of 1890, s. 7 (*vide supra*)), must be by deed, and take effect in possession not later than twelve months after its date.

(2) It must reserve the best rent (see hereon *Re Chambers' Settled Estate*) that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case. If a fine is taken it becomes "capital money." (Settled Land Act, 1884, s. 4.)

(3) It must contain a covenant by the lessee (or, in case of a lease in writing within sect. 7 of the 1890 Act, an agreement) for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(4) A counterpart of every lease must be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life will be sufficient evidence.

(5) A statement contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, will, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated. (Sect. 7.)

(ii) As to building leases;

In addition to the above regulation, building and mining leases are subject to special provisions. With regard to building leases—the consideration must be the fact of the lessee or some person by whose direction the lease is granted, or some other person, having erected or agreeing to erect buildings, either new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed or agreed to execute some improvement authorized by the act for or in connection with building purposes. A peppercorn rent may be made payable during the first five years or any less part of the term. If the land is contracted to be leased in lots, the entire rent to be ultimately payable may be apportioned among the lots in any manner, but no lease is to reserve a rent of less than ten shillings; the total amount of rent reserved must not be less in amount than the amount at which the land as a whole would have to be leased under the act, and the rent reserved by any lease is not to exceed one-fifth of the full annual value of the land with the building thereon when completed. By the Settled Land Act, 1889, a building lease may give an option, to be exercised at any time within an agreed number of years, not exceeding ten, for the lessee to purchase the land at a price fixed at the time of the making of the lease, such price to be the best price, which, having regard to the rent reserved, can reasonably be obtained, and to be either a fixed sum, or such a sum as is equal to a stated number of years' purchase of the highest rent reserved by the lease. The price when received will be capital money within the Act of 1882.

(iii) As to mining leases.

With regard to mining leases—the rent to be reserved may be ascertained by or vary according to the acreage worked or the quantity of mineral obtained, made merchantable, carried

away, or disposed of, or the rent may be made to vary with the price of the minerals gotten. (Settled Land Act, 1890.) A minimum rent may be made payable, and the tenant for life may allow the lessee, in case he cannot pay it, to make up the deficiency in any subsequent period, free of any further rent than the minimum rent. And a mining lease may be made in consideration of the lessee's undertaking to execute, or having already executed, some improvement authorized by the act in connection with mining purposes. (See sect. 25 as to these improvements.) A certain portion of the rent arising from these leases must be set aside, and that whether the mines are already opened or not. Where the tenant for life is impeachable for waste for minerals, three-quarters of the rent must be set aside as capital money under the act; if he is not so impeachable, then only one-quarter, and the remainder in both cases goes to the tenant for life as rents and profits. And lastly, the court may vary the terms and conditions in building and mining leases where it is the local custom to grant leases different from those authorized by the act, and may allow the custom to be followed, when more beneficial to all parties concerned. (See on the subject of mining leases under the act, *Re Kenney's Trusts.*)

The leasing powers given to tenants for life extend to the three following cases: he may carry into effect a contract for a lease entered into by his predecessor in title; he may renew leases; and he may confirm them.

Surrender of leases.

Provision is also made for his surrendering and granting new leases.

These provisions are as follows:—

Regulations as to.

(1) He may accept, with or without consideration, a surrender of any lease of settled land, whether made under this act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

(2) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3) On a surrender, he may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5) On a surrender, and the making of a new or other lease, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6) Every new or other lease shall be in conformity with this act. (Sect. 13.)

Leases of copyhold property.

By sect. 14 of the act, the tenant for life may grant to copyholders licences to lease in the same manner as the tenant for life himself is empowered to do under the act, and so enable the copyholders to make leases binding on the remainderman. The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments. The licence is to be entered on the court rolls, and the steward's certificate will be evidence of such entry.

As to mortgages.

The principal act empowers the tenant for life to make a mortgage, but in two cases only: (1) where money is required for an enfranchisement, or (2) for equality of exchange or partition; and any money so raised on mortgage is to be considered capital money. But by the Act of 1890, s. 11, he may also mortgage for the purpose of discharging an incumbrance on the settled land other than any annual sum payable only during a life or lives, or during a term of years absolute or determinable; but this power he will not be allowed to exercise against the wishes of those who have a charge on the land, if, by the exercise of the power, their rights are liable to be prejudiced. (See *Hampden* v. *Earl of Buckingham*.)

Other powers:

Other powers which are given to the tenant for life are powers to dedicate land for streets and open spaces, and to effect improvements on the estate. The power to dedicate for streets, &c. is contained in sect. 16, which provides that in connection with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents on the settled land, may require or cause any parts thereof to be laid

dedication of property for streets, &c.

out in streets, &c. for the use, gratuitously or on payment, by the public or of individuals, with all works necessary in connection therewith; and may provide that such part shall be vested in the trustee of the settlement or other trustees, or in any company or public body, and may execute all deeds necessary to give effect to the provisions of the section.

Improvements allowed by the act.

As to improvements: these are defined by section 25 to be the making or execution on, or in connection with, and for the benefit of, settled land, of any of the following works:

(i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:

(ii.) Irrigation; warping:

(iii.) Drains, &c. for supply and distribution of sewage as manure:

(iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:

(v.) Groynes; sea walls; defences against water:

(vi.) Inclosing; straightening of fences; re-division of fields:

(vii.) Reclamation; dry warping:

(viii.) Farm roads; private roads; roads or streets in villages or towns:

(ix.) Clearing; trenching; planting:

(x.) Cottages for labourers, &c. employed on the settled land or not:

(xi.) Farmhouses and other buildings for farm purposes (see *Re Newton's Settled Estates*):

(xii.) Saw and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:

(xiii.) Reservoirs, &c. for supply and distribution of water for agricultural, manufacturing, or other purposes, or for domestic or other consumption:

(xiv.) Tramways; railways; canals; docks:

(xv.) Jetties, piers, and landing places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and things required for agricultural purposes, and of minerals, and of things required for mining purposes:

(xvi.) Markets and market places:

(xvii.) Streets, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land:

(xviii.) Sewers and other works necessary or proper in connection with any of the objects aforesaid:

(xix.) Preliminary works necessary or proper in connection with development of mines (this will include the erection of a new pumping machine: *Re Munday's Settled Estates*):

(xx.) Reconstruction, enlargement or improvement of any of those works.

And by sect. 13 of the 1890 Act, the following improvements are to be included in the above list:—(i) Bridges; (ii) making any additions to or alterations in buildings necessary or proper *to enable the same to be let*, and only for this purpose (*In re Gerard's Settled Estate;* and *De Tessier's Trusts*); (iii) erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount reserved for the buildings taken and the sale thereof; (iv) the re-building of the principal mansion house, provided that the sum to be applied shall not exceed one-half of the annual rental of the settled land.

Further, by the Housing of the Working Classes Act, 1890, as read with sect. 18 of the Settled Land Act, 1890, capital money may be used in the erection of buildings for the working classes, that is, of "persons who earn their livelihood by wages or salaries," provided that such buildings shall not exceed in rateable value 100*l.* a year.

Capital money may be used for the improvement of the estate, even though the settlement makes express provision for such improvement (*Cardigan* v. *Curzon-Howe*); but it would seem that "improvements" within sect. 25 must be *permanent* improvements, and the court will not authorize the application of capital money to mere repairs or patchings up. (*Re Newton's Settled Estates.*)

In *Re Byng's Settlement*, capital money under one settlement

was allowed to be used for improvements on an estate settled by another settlement, the trusts being similar, and the court considering that the two settlements could be read as one compound settlement, and so brought within the act.

Course to be adopted when capital money is to be laid out in improvements.

Sects. 27, 28, and 29 relate to the subject of improvements, and provide that where the tenant for life desires capital money arising under this act to be applied towards improvements authorized by the act, he should submit for approval to the trustees or the court a scheme for the execution of the improvement, showing the proposed expenditure; but it is not compulsory on the tenant to submit a scheme, and the court *may* by sect. 15 of the Act of 1890, which is retrospective (see *In re Ormerod's Settled Estate*), direct capital money to be applied towards improvements, although no scheme was submitted before the execution thereof. Where the capital money is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards the improvement, on—

(i) When capital money in hands of trustees;

(i.) A certificate of the Board of Agriculture (Land Commissioners' Department, hereinafter referred to as "the Commissioners") certifying that the work has been properly executed, and what amount is properly payable by the trustees in respect thereof; or on

(ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the commissioners, or by the court; or on

(iii.) An order of the court directing or authorizing the trustees to so apply a specified portion of the capital money.

(ii) When capital money is in court.

Where the capital money to be expended is in court, then after a scheme is approved by the court, the court may, on a report or certificate of the commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money towards the improvement.

Position of tenant for life as to improvements;

The tenant for life may join or concur with any other person interested in executing any improvement authorized by the act, or in contributing to the cost thereof. He, and each of his successors in title (having a limited estate or interest only in the

settled land), must, during such period, if any, as the Land Commissioners prescribe, maintain and repair, at his own expense, every improvement executed under the act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, must insure the same, at his own expense, in such amount, if any, as the commissioners prescribe. depends on certificate of commissioners.

Further, neither he nor any of his successors may cut down, or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement, and they must, from time to time, if required by the commissioners, report to the commissioners the state of every improvement executed, and the fact and particulars of the fire insurance, if any.

The commissioners may vary any certificate made by them as circumstances appear to require, but not so as to increase the liabilities of the tenant for life, or any of his successors. If the tenant for life, or any of his successors, fail to comply with the requisitions of this section, or do any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land, has a right of action against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned. Certificate may be varied.

The tenant for life, and each of his successors as above, and all persons employed by them, may from time to time enter on the settled land, and, without impeachment of waste, thereon execute any improvement authorized by the act, or inspect, maintain, and repair the same, and do, make, and use all acts, works, and conveniences proper for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament. As to waste by tenant for life in respect of improvements.

Note that the act gives no power to raise money for improvements by mortgage of any part of the settled estate. If it is desired to do so, recourse must be had under sect. 30 to the commissioners, and the money raised with their sanction by means of a rent-charge on the land under the terms and with the formalities laid down in the Improvement of Land Act, Raising money for improvements.

1864. The improvements authorized by that act are, however, extended to comprise all the improvements authorized by the act under consideration for the application of capital money, and the charges on the estate placed upon the property to secure repayment of the money borrowed may be redeemed with capital money. (See Settled Land Act, 1887, overruling *In re Knatchbull's Settled Estate;* and see *Re Howard's Settled Estate*, as to how far this provision is retrospective.)

As to "capital money."

We must now turn to the provisions of the act with regard to capital money. As we have before mentioned, any money received in the exercise of the powers given to the tenant for life under the act will not be receivable by him, but will be considered as capital money, and must be paid to the trustees or into court. Capital money includes any money arising under sect. 3 by sale, partition, enfranchisement, or exchange; a proportion of the rent under a mining lease (see sect. 11); any consideration paid on the surrender of a lease under sect. 13; money raised by mortgage under sect. 18; a consideration for varying or rescinding the contract under sect. 31 received by the tenant for life; a certain proportion of the money received for timber under sect. 35, sub-sect. 2; and money received on the sale of heirlooms. And sect. 33 provides that, where under a settlement money is in the hands of the trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as they have independently of the act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under the act. Lastly, by the Settled Land Act, 1884, s. 4, a fine reserved on the grant of a lease under the Act of 1882 is capital money.

What constitutes.

How to be dealt with.

Sect. 21 points out the way in which capital money is to be dealt with, and provides that it shall, when received (subject to claims payable thereout, and to the application thereof for any special authorized object for which it was raised), be invested or applied in one or more of the following modes:

List of investments for capital money.

(i.) In investment on government securities or other securities which the trustees are authorized by the settlement or by law (see Trustee Act, 1893, *ante*, pp. 408, 409)

to invest in, or in bonds, mortgages, debentures, or in the purchase of the debenture-stock of any railway in Great Britain or Ireland incorporated by special act of parliament, and having for ten years before the investment paid a dividend on its ordinary stock or shares, with power to vary investments:

(ii.) In discharge, purchase, or redemption of incumbrances affecting the inheritance (see hereon *Frewen* v. *James*) of the settled land, or of land-tax, rent-charge in lieu of tithe, crown rent, chief rent, or quit rent, charged on or payable thereout (this will be allowed even though the capital money is derived from sale of heirlooms: *Re Marlborough's Settlement*): capital moneys can be applied under this section not only in redeeming a rent-charge, but in payment of a bonus which the owners of the charge demand as compensation in respect thereof (*Re Lord Egmont's Estates*):

(iii.) In payment for any improvement authorized by the act (see hereon *Re Bulwer Lytton's Will*):

(iv.) In payment for equality of exchange or partition:

(v.) In purchase of the seigniory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:

(vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:

(vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land:

(viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:

(ix.) In payment to any person becoming absolutely entitled:

(x.) In payment of costs incidental to the exercise of any of the powers, or execution of any of the provisions of the act (this will include the costs of an abortive sale by the tenant for life: *Re Smith's Settled Estates*):

(xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder:

(xii.) In payment of money and costs spent by a landlord under the Agricultural Holdings Act, 1883, in the execution of first or second class improvements, and also in discharge of charges created on a holding under that act for such improvements (46 & 47 Vict. c. 61, s. 29):

(xiii.) Upon dwellings to be erected under the Housing of the Working Classes Act, 1890, the building of which is not, in the opinion of the court, injurious to the estate, and the rateable value of which does not exceed 100*l.* a year (see 53 & 54 Vict. c. 70; and 53 & 54 Vict. c. 68, s. 11; and *ante*, p. 457):

(xiv.) In paying off a rent-charge created to pay off moneys advanced, under the Improvement of Land Acts, to defray the expenses of improvements authorized by the Act of 1882, even though the advance was made before the Act of 1882 came into operation, that is, before 1st January, 1883. (Settled Land Act, 1887.)

And by the Settled Land Act, 1890, sect. 13:

(xv.) On bridges:

(xvi.) Making additions to or alterations in buildings reasonably necessary or proper to enable the same to be let:

(xvii.) Erecting buildings in substitution for buildings taken by a local or public authority or under compulsory powers:

(xviii.) Rebuilding the principal mansion house; provided that the sum to be expended does not exceed half the rental of the settled land.

To whom capital money is paid previously to investment.

In order to obtain an investment of capital money, it must be paid either to the trustees of the settlement or into court, at the

option of the tenant for life. The investment or other application will, subject to the provisions of sect. 34 of the act (see hereon *Cottrell* v. *Cottrell*, and *In re Bowyer's Settled Estate*), be made according to the direction of the tenant for life, and in default thereof according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees. Investments are to be in the names or under the control of the trustees. The investment or other application under the direction of the court is to be made on the application of the tenant for life, or of the trustees; and investments or other applications are not, during the life of the tenant for life, to be altered without his consent. But by the Act of 1890, s. 14, the court has a discretion to pay out capital money in court to the trustees of the settlement for the purposes of the Settled Land Acts.

Who selects investments.

The capital money while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, will be considered as land, and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone.

How capital money treated till invested.

The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement; and those securities may be converted into money, which shall be capital money. Lastly, capital money arising from settled land in England is not to be applied in the purchase of land out of England, unless the settlement expressly authorizes it.

How income of investments treated.

Supposing land has been acquired by purchase or in exchange, or on partition, it must be made subject to the settlement in the following way:—

Lands bought with capital money: how dealt with.

Freehold land must be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit.

Copyhold, customary, or leasehold land must be conveyed to and vested in the trustees on trusts and subject to powers and

provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to, on, and subject to which freehold land is to be conveyed; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land would go. Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion, and in order to the completion, of a sale, exchange, or partition.

Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge.

On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

As to the cutting of timber.

By sect. 35, provisions are made as to the cutting of timber by a tenant for life. If he is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, he may cut it down and sell it, on obtaining the consent of the trustees, or an order of the court. But three-fourths of the net proceeds of the sale are to be set aside as capital money, and the other fourth only will go to the tenant as rents and profits.

Provisions as to the trustees of the settlement.

(i) As to appointment of trustees.

The 38th to the 43rd sections relate to trustees, and provide, *inter alia*, that, if there happen to be no trustees within the definition of the act, or it is expedient for the purposes of the act to appoint new trustees, the court may, on the application of the tenant for life, or any other person having under the settlement an estate or interest in the settled land, or, in case of an

infant, of his guardian or next friend, appoint new trustees. (For an instance of an appointment on an application under this section, see *Wheelwright* v. *Walker*.) It has been decided under this provision that the court will not appoint the tenant for life himself to be a trustee (see *Re Harrop's Trusts*), nor the solicitor for the tenant for life. (*Re Walker's Trusts*.) The persons appointed by the court, and, till the appointment again of new trustees, the representative of the last surviving or continuing trustee, are to be the trustees of the settlement within the act. Sect. 39 provides that capital money is not to be paid to fewer than two persons as trustees unless the settlement authorizes the receipt of capital trust money by one trustee. By sect. 47 of the Trustee Act, 1893, all the powers and provisions of that act, with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, whether they are appointed by the court or by the settlement, or under the provisions contained in the settlement.

(ii) As to receipt by trustees of capital money.

Then follows a provision as to trustees' receipts, which is practically the same as that conferred on trustees by the Trustee Act, 1893, s. 20 (see *ante*, p. 414.) By sects. 41 and 43, provisions for indemnity and powers of reimbursement are given to the trustees; and sect. 42 provides that trustees shall not be liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might do; and that, in case of the purchase of land with capital money, or of an exchange, partition, or lease, they shall not be liable for adopting any contract made by the tenant for life, nor bound to inquire as to the propriety of the purchase, exchange, partition, or lease, nor answerable as regards any price, consideration, or fine, nor liable to see to nor answerable for the investigation of the title, nor answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, nor liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, nor as giving a receipt for the purchase-money, nor in any other character, nor in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

As to liability of trustees.

Lands settled upon trust for sale.

The last provision of this act which we shall notice is that contained in sect. 63, the object of which is to make the provisions of the act apply to the case where lands are vested in trustees upon trust to sell, with power for them to postpone the sale at their discretion, and where such directions are followed by a settlement of the proceeds of the sale in the form made use of for the settlement of personal estate. (See *ante*, pp. 393, 394.) The act provides that in such a case the money arising from the sale, or the income of the money, or the income of the land till sale, shall be considered as settled land, and the person for the time being entitled to such income shall be considered the tenant for life. All the provisions of the act are then to apply, except that any reference in the act to remaindermen, reversioners, predecessors or successors in title, shall be deemed to refer to the persons interested in succession in the money. But by sect. 7 of the Settled Land Act, 1884, a tenant for life under a settlement coming within sect. 63 of the Act of 1882 can only exercise the powers given by that act by the leave of the court. The trustees are *primâ facie* the proper persons to determine how the land is to be sold, unless the court, under this section, gives the tenant for life leave to exercise the statutory power of sale, which it will do if satisfied that a sale will be fit and proper and for the benefit of all the persons interested. (*Re Harding's Settled Estates.*) So long as an order of the court giving any leave to any person to execute any of such powers is in force, neither the trustees of the settlement nor any person other than he to whom the leave is given is to execute any trust or power created by the settlement for any purpose for which leave is given by the court. An order giving such leave may be registered as a *lis pendens*, and persons dealing with the trustees will not be affected by it unless it is so registered. Any capital money arising from the land in trust to be converted under this section shall not be applied in the purchase of land, unless so authorized by the settlement, but may be applied in any other mode in which capital money may be invested. Any capital money arising from the settled land, and the securities in which the same is invested, is not to be prevented from devolving as personal estate, unless, if arising under the settlement, it would have been considered as land; and any land taken in purchase, ex-

Sale by tenant for life.

Application of capital money in such a case.

change, or partition, shall be vested in the trustees on the same trusts as were subsisting with respect to the settled land, or as near thereto as possible. Though the tenant for life under a settlement falling within the 63rd section of the Settled Land Act, 1882, cannot sell the land without the leave of the court, yet it was held in *Taylor* v. *Poncia*, and it is now expressly enacted by the Settled Land Act, 1884, that the trustees can sell the property without the consent of the tenant for life. (See also *Re Earle and Webster*.) Sale by the trustees.

Such are the main provisions of the Settled Land Act, 1882, as altered by the Act of 1884. It remains for us now briefly to refer to the provisions of the Settled Estates Act, 1877.

This act defines the expression "settlement" in much the same terms as the Settled Land Act, and, though there is no provision corresponding with sect. 63 of that act, it has been held that where real estate is devised to trustees on trust to sell at their discretion, and invest the proceeds and pay the income to one or more persons successively for life, with remainder over, such estate is a "settled estate." (See *Re Laing; Re Horn; Beioly* v. *Carter*.) And by the Conveyancing Act, where a person entitled to land in fee, or for any leasehold interest at a rent, is an infant, the land is to be deemed a settled estate within this act. But there is no definition of a tenant for life, except that it is provided that a tenant in tail after possibility of issue extinct shall be deemed one. (Sect. 2.) The object of the act is to facilitate the leasing and sale of settled estates; but (except under sect. 46) it requires leases and sales thereof to be made only after application to and by the consent of the Chancery Division. The leases which the court may authorize are subject to certain restrictions. They must take effect in possession, or within one year from the making thereof, and must not exceed, for an agricultural or occupation lease, 21 years, or 35 years of an Irish estate; for a mining lease, 40 years; for a repairing lease, 60 years; and for a building lease, 99 years. The best rent must be reserved and made payable half-yearly or oftener, and no fine can be taken. Nor is any lease to authorize the felling of trees except under special circumstances, and every lease authorized must be by deed, and the lessee must execute a counterpart, and the lease must contain a condition for re-entry

The Settled Estates Act, 1877. Definitions.

Object of act.

As to leases by the court.

on non-payment of rent for twenty-eight days. The power to authorize leases is extended by sect. 8 to authorize preliminary contracts to grant leases, and any of the terms of such contracts may be varied in the leases; and it also extends to authorize the granting of licences to copyholders to grant leases to persons to the same extent and for the same purposes as leases may be authorized or granted of freeholds under the act. (Sect. 9.)

After approving of a lease, the court may direct who shall execute it as lessor (sect. 12), or it may vest general powers of leasing in the trustees of the settlement, or in other persons as trustees. (Sect. 13.)

As to sales by the court.

As to sales, the court may authorize sales of settled estates and timber (except ornamental timber (sect. 16)); and on any sale minerals, &c. may be excepted. (Sect. 19.) On every sale the court may direct what person or persons shall execute the deed of conveyance. (Sect. 22.) The act then goes on to designate who may petition the court for the exercise of its powers, and in effect provides that the application may be made by a tenant for life, or for a greater estate, or by the assignee of such tenant. (Sect. 23.) But the application must be made, with certain consents, as follows:—All persons in existence, and all trustees for unborn persons having any beneficial interest, must consent. (Sect. 24.) But if there is a tenant in tail in existence, then persons who have interests subsequent to his need not concur if he is *sui juris*, and the court may dispense with the consent of such persons if the tenant in tail is an infant. (Sect. 25.) In other cases the court may dispense with the consent of any person, having regard to the number and interests of the persons assenting and dissenting respectively. (Sect. 28.) And an order may be made without consent, but subject to the rights of any person with whose consent the court does not think fit to dispense. (Sect. 29.) Where the court does not, in the first instance, think fit to dispense with the consent of any person, it may direct him to be served with a notice requiring him to state within a specified time whether he consents, dissents, or submits his interests to the court, and if he omits to comply with the notice he is deemed to have submitted his interests to the court. (Sect. 26.) The court is empowered to dispense with the service

of such a notice if the person cannot be found; if it is uncertain whether he is living or dead; if the expense of service would be disproportionate to the value of the property; and the person on whom service is so dispensed with is to be deemed to have submitted his interests to the court. (Sect. 27.)

Act is not always applicable.

The court may not exercise the powers conferred on it by the act where an application has been made for a private act of parliament for purposes similar to those which the court may effect under this act, and it has been rejected on its merits, or reported against by the judges to whom such bill may have been referred (sect. 32); nor where the settlement expressly provides that they shall not be exercised. (Sect. 38.)

Application of moneys arising from sale.

Provisions are made for the application of the moneys arising from sales, which may be paid to trustees appointed by the court, if the court thinks fit, or into court, and the money will then be applied in redemption of land tax, discharge of incumbrances, in the purchase of other hereditaments to be settled in like manner as those sold, or in payment to any person absolutely entitled. (Sect. 34.) Further, by the Settled Land Act, 1882 (sect. 33), the money may be applied in any of the ways authorized by that act for "capital money."

As to leases by the tenant for life.

The act gives certain powers to tenants for life, or for greater estates, if not restrained by the settlement, to make leases without application to the court; and, for the purposes of these powers, a tenant for life will include a tenant by the curtesy or in dower (dowresses are not mentioned by the Settled Land Act, 1882), or in the right of a wife seised in fee. The lease authorized must not exceed twenty-one years in length, nor thirty-five years in the case of Irish estates; must take effect in possession, or within a year of its making; it must be by deed, and the best rent must be reserved without fine, and be incident to the immediate reversion. And the demise must not be made without impeachment of waste, and must contain a covenant for the payment of rent, and other usual and proper covenants, and also a proviso for re-entry for non-payment of rent for twenty-eight days; and, finally, a counterpart must be executed by the lessee. (Sect. 46.) The above leasing power only extends to settlements made after the 1st November, 1856. (Sect. 57.) Dowresses and husbands having an estate in the right of a

Some differences between the Acts of 1877 and 1882.

wife seised in fee, who wish to make a long lease, will still have to apply under this act, as they are not included in the Settled Land Act, 1882. You will also observe that no notice is required, before leasing, under this section, as under the Act of 1882. Further, with regard to a mining lease for not exceeding twenty-one years, if made under the Act of 1877, the whole of the rent goes to the tenant for life; but this lease could not be made by a tenant for life impeachable for waste, excepting with regard to mines opened when he became entitled to the possession.

Provisions to meet cases of disability.

Powers given by the act, applications to the court, and consents to and notifications respecting such applications, may be executed, made, or given by or to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees of the property of bankrupts. But in the cases of infant or lunatic tenants in tail, no application to the court, or consent to or notification respecting an application, may be made or given by a guardian or committee without special direction of the court. (Sect. 49.) If a married woman applies to the court, or consents to an application to the court, she must, at least if married before 1st January, 1883 (*Re Harris's Settled Estate;* and see *Reddell* v. *Errington*), first be separately examined as to her free consent to the application; and this examination is to be made even if the property, the subject of the application, is settled in trust for her separate use, and no clause against anticipation is to prevent the court from exercising its powers. (Sect. 50.)

IV.—Voluntary Settlements.

What constitutes a voluntary settlement.

A settlement may of course be made after, as well as before, the solemnization of a marriage; but there is this difference between them, that if the settlement be made before the marriage, it is not a mere voluntary one, because marriage constitutes a valuable consideration; whereas, if the settlement be

made after the marriage, it is a voluntary one. But there are exceptions to both these rules. For a settlement made after marriage, if made in pursuance of a binding ante-nuptial agreement, stands in the same position as an ante-nuptial settlement. Again, an ante-nuptial settlement may be founded on valuable consideration as to some of the parties taking a beneficial interest under it; but at the same time be voluntary as to other such persons. That is to say, the consideration, consisting of the marriage, may extend to some, and yet not to others, of the parties under it. The husband and the wife, and the issue, are all within the marriage consideration; and, so far as they derive any interest under the settlement, are considered as having given valuable consideration for it. But if the settlement limits estates to collateral relations of the settlor, these limitations are, as a rule, not considered as being founded on valuable consideration given by such collaterals, and the collaterals will be considered as mere volunteers. Thus, limitations of an intended wife's property in favour of the children of a second marriage, and of nephews and nieces, are purely voluntary gifts, and are not within the consideration of the marriage. (*Wollaston* v. *Tribe.*) It has been held that if a widow on her second marriage stipulates that her children by a former marriage shall share in the benefits of a settlement made on that occasion, these children will be considered to be within the consideration of marriage, as well as the issue of the marriage (*Newstead* v. *Searles*); but this does not hold good when the settlor is a *widower*, and on his second marriage property is settled on the children of his first marriage: the latter are mere volunteers. (*Re Cameron and Wells.*) In *Gale* v. *Gale* it was held, that an intended wife may not only stipulate for a provision to be made out of her property for her children by a former marriage, but also for an illegitimate child, and that a settlement to carry into effect such a stipulation is not voluntary. But where there is a limitation in favour of the wife's next of kin, the next of kin are volunteers. (See *Paul* v. *Paul; Clarke* v. *Wright; Dickenson* v. *Wright.*) Limitations, however, in favour of a stranger to the marriage consideration, if so mixed up with limitations in favour of persons within that consideration that effect cannot be given to the latter without also giving

When post-nuptial settlements are not voluntary.

When ante-nuptial settlements are voluntary.

Settlements on wife's children by former husband.

Settlements on entire strangers.

effect to the former, will be upheld, though they are voluntary. (See *Clayton* v. *Lord Wilton.*) And, as a rule, if the limitations to strangers to the marriage consideration are in favour of the collateral relations, not of the settlor, but of the other party to the settlement, as where the husband is the settlor, and limits property to the collateral relations of the wife, the presumption will be that such limitations must have been the result of some ante-nuptial contract, so that they will be *primâ facie* not voluntary.

Sham ante-nuptial settlements.

A settlement made in consideration of marriage by a man on a woman with whom he has been previously living, and with whom he goes through a form of marriage, is regarded as a mere voluntary settlement, and a fraud on the husband's creditors. (*Columbine* v. *Penhall;* and see *Bulmer* v. *Hunter.*) And so is a settlement made in consideration of marriage, but containing a power of revocation by the settlor. (See *Pannell* v. *Steadman.*) So also is a settlement made by an insolvent person in favour of his wife who at the time of the marriage and the settlement was fully aware of the settlor's impecunious state, and where, but for the desire to defeat creditors, the marriage would, or at least might, never have taken place. (*In re Pennington, Ex parte Cooper.*) For such settlements are "mere shams," and are not entitled to rank in the same light as ordinary marriage settlements.

When post-nuptial settlements are binding.

Post-nuptial settlements are not necessarily voluntary, for they may, of course, rest on other valuable consideration than mere settlement of property. Thus a post-nuptial settlement is not voluntary if it is made in consideration of the conferring of a further portion, or of an agreement to pay a further portion which is afterwards paid; and the loan of money to the settlor by a relative of the wife has been held to prevent a settlement on the wife being voluntary. (*Bayspoole* v. *Collins.*) Again, a settlement by a husband and wife (previous to the Married Women's Property Act, 1882), of the wife's property to her separate use, remainder to the husband for life, remainder to the children, though a post-nuptial one, is not voluntary, as there is a valuable consideration constituted by the husband modifying his life interest in possession, and the wife her inheritance. (*Hewinson* v. *Negus; Teasdale* v. *Braithwaite.*)

And in *Price* v. *Jenkins* (followed in *Re Lulham*, and also in *Re Foster and Lister*, and *Harris* v. *Tubb*) it was held that a post-nuptial settlement of leaseholds, to which a heavy liability was attached, was not a voluntary one, and fraudulent, and so void as against a subsequent purchaser within 27 Eliz. c. 4, the liability constituting a valuable consideration. (But see now the Voluntary Conveyances Act, 1893, *post*, p. 474.) But such a settlement may still be fraudulent and void under 13 Eliz. c. 5, against creditors. (*Ridler* v. *Ridler*; and see *Ex parte Hillman*; *Shurmur* v. *Sedgwick*; and *Schrieber* v. *Dinkel*.) Again, an agreement by the wife to resign a contingent interest to which she is entitled forms a valuable consideration. (*Ward* v. *Shallett*.) So, too, there is valuable consideration where the wife relinquishes her interest under an existing settlement, or her jointure, or dower, or mortgages her separate estate to pay the husband's debts, or if a husband relinquishes his estate *in jure mariti*.

How far voluntary settlements are liable to be avoided: (i) Under 27 Eliz. c. 4.

What, then, are the consequences of a settlement being voluntary? There are several statutes which bear on this point. By 27 Eliz. c. 4, all conveyances, &c., of lands, tenements, and hereditaments, made with intent to defeat or defraud purchasers, and also all conveyances with a clause of revocation at the grantor's pleasure, are void as against subsequent purchasers. It has been settled that all voluntary deeds, except those made in favour of a charity, are fraudulent within this statute, and so void as against a subsequent purchaser, even if that purchaser have notice of the voluntary conveyance. (*Otley* v. *Maning*.) It will be noticed that this statute refers not to voluntary but to fraudulent settlements; in its construction, however, it was held that voluntary settlements were (except when in favour of charities: *Ramsay* v. *Gilchrist*) fraudulent and void under its provisions; but this is altered now by the Voluntary Conveyances Act, 1893, *infra*. But this was only so when the voluntary conveyance and the subsequent sale for value were made by the *same* person, so that if the heir of a person who had made a voluntary conveyance, and was dead, made a sale for value of the same premises, such sale would not defeat the voluntary conveyance. (*Newman* v. *Rusham*.) And again, if a person to whom a voluntary conveyance had been made

Some cases.

sold the premises granted thereby to a purchaser for value, the purchaser took a good title, and could not be disturbed by a subsequent purchaser from the original settlor. But a voluntary conveyance was always good as against the grantor and all persons claiming under him, except a purchaser for value; so that, if of two voluntary grantees the second one in point of time sold the premises to a purchaser for value, the purchaser would get nothing, because the first voluntary conveyance divested the original grantor of all his interest, and he had then nothing to pass to the second voluntary grantee, who accordingly would have nothing to convey to a purchaser.

Voluntary Conveyances Act, 1893.

And now it has been expressly provided by the Voluntary Conveyances Act, 1893, that no voluntary conveyance (which expression includes every mode of disposition mentioned or referred to in 27 Eliz. c. 4) of any lands, tenements or hereditaments, whether made before or after the passing of the act (29th June, 1893), if, in fact, made *bonâ fide* and without any fraudulent intent, shall hereafter be deemed fraudulent within the meaning of 27 Eliz. c. 4, by reason of any subsequent purchase for sale, or be defeated under any of the provisions of that act by a conveyance made upon any such purchase, any rule of law notwithstanding. (See 56 & 57 Vict. c. 21, ss. 2 and 4.) It will be observed that the act is retrospective, and prevents voluntary settlements, made on or before the 29th June, 1893, being defeated by a sale made after that date; but by sect. 3, it is expressly provided that the act is not to apply to any case in which, before the passing of the act, the author of such a voluntary conveyance had disposed of, or dealt with, the lands, &c., comprised therein, to, or in favour of, a purchaser for value.

Consequently, in future, where A. has settled by a voluntary settlement his lands on his wife and children, or, indeed, on anyone else, provided there was no intent to defraud, it will not be possible for him, by a subsequent sale of the property, to defeat the title of the voluntary grantees under 27 Eliz. c. 4. The Act of Elizabeth is not repealed, and where the settlement is not merely voluntary but fraudulent, it will still be void under that act, if the lands are subsequently sold to a purchaser whose rights the settlement was expressly intended to defeat.

(ii) Under 13 Eliz. c. 5.

By 13 Eliz. c. 5, which is in no way affected by the Act of 1893, all conveyances, &c., of land, goods, or chattels, made with intent to delay, defeat, or hinder creditors, are void as against them, save conveyances to purchasers for valuable consideration without notice. If the intent to defraud is clear, a conveyance, even though it be for value, is void under this statute. (*Holmes* v. *Penney;* see also *Re Johnson.*) Voluntary conveyances are not necessarily void under it, but a voluntary deed will be presumed to have been made with the intent to defeat creditors, if that will be its probable effect, having regard to the amount of property included in it, and the amount of the settlor's indebtedness at the time he made it. (See *Jenkyn* v. *Vaughan.*) And generally a voluntary settlement will be avoided by showing that the settlor was so much embarrassed at the date thereof that the effect of the settlement would probably be to defeat creditors. (See *Crossley* v. *Elworthy; Ex parte Russell.*) In *Freeman* v. *Pope* it was said that the test of the existence of an intention to defeat creditors was, whether at the date of the settlement the settlor could have paid his debts without having recourse to the property comprised in the settlement; but later cases would seem to show that a voluntary settlement may be set aside though the settlor could have paid his debts at the date of the settlement without the aid of the property comprised therein, if he contemplated a state of things which might not improbably result in bankruptcy or insolvency, as if he were engaging in a hazardous business or were incurring heavy liabilities. (See *Mackay* v. *Douglas*, and *Ex parte Russell.*) And in *Re Pearson* where a person, not engaged in trade, and who owed no debts, made a voluntary settlement, whereby money was settled in trust to pay the income to the husband for life or till bankruptcy, remainder to the wife for life for her separate use, remainder to the children, with an ultimate remainder to the settlor, and he a long time afterwards engaged in trade and became bankrupt, it was held that the settlement was fraudulent and void as against creditors. A voluntary deed may be set aside by a person who became a creditor of the settlor subsequent to the deed, even though there is no creditor left whose debt was in existence at the date of the settlement. (*Taylor* v. *Coenen; Ware* v. *Gardner.*) Time does not run in

Some cases.

connection with the statute, and so a voluntary conveyance can be impeached at any distance of time. (See *The Three Towns Building Co.* v. *Maddever.*)

(iii) Under sect. 47 of 46 & 47 Vict. c. 52.

Lastly, by the Bankruptcy Act, 1883, a voluntary settlement will, if the settlor becomes bankrupt within two years after the date thereof, be void as against the trustee in bankruptcy; and if he becomes bankrupt at any subsequent time within ten years from the date thereof, will be void against such trustee, unless the parties claiming under it can prove that the settlor was at the time of the making thereof able to pay all his debts without the aid of the property comprised therein, and that the property passed to the trustee on the execution of his settlement. (Sect. 47.) This section does not apply to a settlement executed by a non-trader before the act came into operation, a similar provision contained in the Bankruptcy Act, 1869, only applying to traders. (*Ex parte Todd, Re Ashcroft.*)

Some cases.

In the construction of this statute, it has been held that a gift of diamonds by a man to his wife is within the statute, and therefore, on his bankruptcy, the diamonds must be handed over to his trustee, unless, indeed, they have been sold or pledged to a *bonâ fide* purchaser or pledgee, for in that case the trustee has no claim, and this even though the bankruptcy occurs within two years of the gift, and the sale or pledge did not take place in market overt, the court holding that the word "void" in the section must be construed as voidable (*Re Vansittart*); and it would appear that this view would hold also in the case of lands the subject of a voluntary settlement being sold to a purchaser for value (*Re Brall*), though if a purchaser bought without notice of there being such a voluntary conveyance, he might, on discovering its existence before completion, refuse to complete, owing to the trouble he might be put to in defending his title, in case the bankruptcy occurred before the ten years had elapsed. (*Re Briggs and Spicer.*)

How far a voluntary settlement can be recalled.

Another point in connection with a voluntary settlement, whether of realty or personalty, which is deserving of notice, is, that it cannot be revoked or varied by the settlor, if it has been carried into effect by the assignment of the property, or by the creation of valid trusts. (See *Ellison* v. *Ellison*; *Paul* v. *Paul.*)

Revocability of a voluntary settlement:

The rule is that where a person who, with his eyes open, makes a voluntary settlement without any undue influence brought to bear on him, and without fraud practised on or misrepresentation made to him, he is bound by his own settlement. Thus, in *Ingold* v. *Powell*, where there was a voluntary settlement of personalty without a power of revocation, it was held that such a settlement (unless there was some fiduciary relationship between the parties) could only be set aside if the settlor could show that he acted under undue influence, or that, at the time of executing it, he was labouring under some mental incapacity; and in *Henry* v. *Armstrong*, it was laid down that, if a person of full age and of sound mind executes a voluntary conveyance, he cannot have it set aside without giving substantial reasons why the transaction should not stand; and the fact that the deed contained no power of revocation will not throw on the grantee the onus of supporting it. Where a voluntary settlement contains no power of revocation, however, it will not require much to induce the court to set it aside, for it presumes that the grantor of such a settlement would, if he had known, have naturally wished to secure to himself the right to revoke it (see *Everitt* v. *Everitt*); and this will be especially the case when there is evidence that the settlor was not aware as to the effect of the settlement or as to its contents. (See *Toker* v. *Toker*; *Phillips* v. *Mullings*; *Hall* v. *Hall*.) If you should be acting for a person who wishes to make a voluntary settlement, it will be your duty to suggest to him the propriety of inserting a power of revocation, though the absence of such a power will not affect the validity of the deed, and the court will not consider the propriety or impropriety of such a clause, except as evidence that the settlor did not understand what he was doing. (*Dutton* v. *Thompson*.)

(i) By the settlor;

(ii) By the court.

Solicitor's duty.

Agreements for voluntary settlements:

Another point for consideration with regard to voluntary settlements is the question, will an agreement to execute such a settlement be specifically enforced? or, will a settlement which is imperfect be carried out by the court if, at the same time, it is a voluntary one? The rule hereon is that, where a settlement or trust is voluntary, the court will not enforce it unless the settlor has done everything in his power which, according to the nature of the property, is necessary to be done in order

are not enforced.

Illustrations.

to establish a complete and executed trust. Thus, the settlor must either have actually declared himself to hold the property as a trustee for the volunteers, or must have shown an intention at least to constitute himself a trustee *in præsenti*, and not merely an intention to create a trust *in futuro* (which intention is to be gathered from the nature of the transaction, and of any other evidence which shows that he considered that he was actually a trustee of the property, and did not merely consider that he had made a gift of it), or he must have transferred his whole interest in the property to a trustee, or have done all in his power so to transfer it for the purposes of the settlement. These propositions may be illustrated by the following cases. In the case of *Jeffries* v. *Jeffries*, where a father, *inter alia*, covenanted to surrender copyholds to the use of trustees, to be held by them on certain trusts, but died without having surrendered them, and, moreover, after having devised certain portions of them to his wife, it was held that the court would not carry out the intended settlement and decree a surrender of the copyholds; for the settlor had neither declared himself a trustee, nor had he surrendered the copyholds to the trustees, but had merely entered into a voluntary contract to transfer them. In *Jones* v. *Lock*, where there was an imperfect gift of chattels and no declaration of trust, it was said that cases of this kind all turn on the question whether there has been a declaration of trust or an imperfect gift. In the latter case the parties would receive no aid from the court if they claimed as volunteers; but when there has been a declaration of trust, then it will be enforced, whether there has been consideration or not. Again, where there was an imperfect assignment of a share in a company, the assignment being only by indorsement on the share, which was retained by the assignor, it was attempted to enforce the assignment by contending that it operated as a valid declaration of trust. But the court held that, as the alleged settlor had not declared himself to be a trustee, but had meant to make a gift, and there was no case in which a person has been compelled to perfect a gift which in the mode of making it he has left imperfect, the contention could not prevail. (*Antrobus* v. *Smith*. See also *Milroy* v. *Lord*; *Richards* v. *Delbridge*; *Steele* v. *Walker*.) In *Re*

Differences between an imperfect assignment and a declaration of trust.

Breton's Estate, where there was an imperfect assignment of furniture by a husband to his wife by letters, the court followed *Milroy* v. *Lord* in preference to the later cases, *Baddley* v. *Baddley* and *Fox* v. *Hawks*, and held that the imperfect assignment could not be construed as a declaration of trust, and could not be enforced; and the same course was adopted more recently in *Pethybridge* v. *Burrow*, where there was an imperfect gift of a bond, and the court refused to uphold it as a declaration of trust. Where, however, the attempted assignment is imperfect, but the alleged assignor has done all in his power to pass the property, the imperfect assignment will be upheld. Thus, where the assignor had an agreement for a lease, and executed a voluntary settlement, assigning all his interest to trustees on certain trusts, and it was objected that he had not declared himself a trustee, and had not conveyed the leaseholds to the trustees, it was said that the assignor had done all he could have done at the time of his making the assignment to pass the leaseholds, and the gift was enforced. (*Gilbert* v. *Overton*. And see *Kekewich* v. *Manning*, and *Nanney* v. *Morgan*.)

V.—Some Miscellaneous Matters.

Stamps.

The stamp duty to be impressed on settlements of sums of money, whether they are voluntary settlements or settlements for value, is at the rate of 5*s*. for every 100*l*. or fractional part of 100*l*. settled or agreed to be settled. Where there is a covenant to settle after-acquired property, the settlement must be stamped with a further stamp of the value of 10*s*.; but if the covenant is to make up the settled fund to a certain amount, then *ad valorem* duty of 5*s*. on the whole amount is chargeable.

A settlement of furniture does not require *ad valorem* duty, but a deed stamp of 10*s*.; and the same remark applies to a settlement of the proceeds of sale of real estate, or of real estate. (See *Stuckley* v. *The Commissioners of Inland Revenue*.)

A settlement of a life policy is charged with a 5*s*. *ad valorem* duty on the amount of the assurance, unless there is no provision

for keeping up the policy, since, in that event, the duty will be on the value of the policy at the date of the settlement. A mere covenant to pay the premiums renders the settlement subject to an *ad valorem* duty, although there is no special fund provided for the payment. The provision for keeping up the policy need not be contained in the settlement itself.

Where there has been an agreement for settlement on which a settlement stamp of over 10*s.* has been paid, the settlement is not charged with an *ad valorem* duty, but with a 10*s.* stamp.

A deed appointing new trustees, and also a deed by which a trustee retires, must be stamped with a 10*s.* deed stamp, and if such a deed also vests the trust property (whether by conveyance or a declaration under the Trustee Act, 1893, s. 11) in the continuing and new trustee, or in the remaining trustees, it must be stamped with a further duty of 10*s.* (*Hadgett* v. *The Commissioners of Inland Revenue.*)

Where the court, for the purpose of vesting property in a new trustee, makes, under Part III. of the Trustee Act, 1893, a vesting order, such order must be stamped with a 10*s.* deed stamp as well as with the ordinary judicature fees. (*Re Potter.*)

Legal Charges for Settlements.

A settlement is usually prepared (at least where both parties bring property into the settlement) by the wife's solicitor, and all legal charges incurred are paid by the husband; and this is not apparently affected by the provision of the Married Women's Property Act, 1882, by which the husband is not liable for the ante-nuptial debts of the wife beyond the value of the property he becomes entitled to through her.

The charges do not depend on the value of the property settled, but on the work done, that is to say, on the old system, as allowed by Schedule II. of the Solicitors' Remuneration Order, 1881.

The settlement belongs to the trustees, and the solicitor must hand it over to them, even though he has not received his costs, as he has no lien on the settlement. (*Austen* v. *Barker.*)

Part VI.—WILLS.

We propose to consider this subject under the following headings:—

I. The Construction of a Will.
II. The Contents of a Will.
III. The Execution of a Will.

I.—The Construction of a Will.

Introductory.

Before you can be considered competent to draft a will, so that it shall put into clear and unmistakable language the intentions of your client, it will be necessary for you to have a full knowledge of the general rules which are applied in the construing of wills, and also of the meaning which has been attached by the law, as appearing from various decided cases, to particular words, expressions, or phrases in wills. As we shall see, when considering the contents of a will, some rules of construction are to be found in the Wills Act; but there is an innumerable host of other rules which have been from time to time laid down by the courts in the cases which have come before them. It may be true that each will is to be construed by itself, and not with reference to other wills; but other decisions will be referred to in order to see in what manner the principles of reasonable construction have been applied by judges of high authority in cases more or less similar. (See *Waite* v. *Littlewood*.) We propose, then, in the first instance, to mention some of the general rules which have been established for the construction of wills, and then to examine a few of the words and expressions most frequently

occurring in wills, in order to see what interpretation has been given to them by the law. But the illustrations are given more for the purpose of awaking the student to the realization of the difficulties which beset the path of the conveyancer in drafting a will, than as a guide to show him what particular phrases and words he should use. Each will practically stands upon its own merits, and the fact that the word "relations" has been held to include certain persons in one will is no criterion by which the meaning of the word as employed in another will may be tested. The rule which dominates all other rules of construction of wills is that the intention of the testator is before all things to be considered. The object, then, of the draftsman should be rather to make this intention clear than to employ technical words, relying upon the construction which such words may have received from the courts in decided cases.

General Rules of Construction.

Testator's intention is to be effected.

The first rule is, that everything possible shall be done to effectuate the intention of the testator, so far as such intention is consistent with the rules of law.

But intention here means the intention as appearing from the express words of the will, or from implication from the words used therein. Intention must not be imputed by mere uncertain conjecture, contrary to the express words, especially when the will has been drawn by a person skilled in the practice of conveyancing. (See *Egerton* v. *Earl Brownlow*.) You will not be allowed to adduce extrinsic evidence to show what the testator meant, except in one case—where there is a latent ambiguity—*i. e.*, where the ambiguity does not appear on the face of the will itself, but is only apparent when it is attempted to give effect to it. (See *Charter* v. *Charter*, and *Reynolds* v. *Whelan*.) But, in general, extrinsic evidence is not admissible to affect the construction of a will. Thus, suppose there is a reference in a codicil to a revoked will, but nothing on the face of the codicil to show an intention to revive the will, extrinsic evidence will not be allowed to show that the reference to the will was meant by the testator to amount to a revival of it. (See *Re Steele*.) Nor, if a devise or bequest is inadvertently omitted, can parol evidence be given to supply it,

Extrinsic evidence:
(i) Allowed to explain latent ambiguities;

(ii) Not allowed to find out intention;

or show that it was intended. (See *Mitchell* v. *Gard.*) Again, where a legatee is once correctly named and described in one part of the will, and the same name occurs again in another part as a legatee without any description, evidence will not be admitted to show that a different person was intended. (*Webber* v. *Corbett.*) But in a recent case, where the name of one sister was inserted, by mistake of the conveyancer, for that of the other sister, probate was granted with the repeated name omitted (*Re Boehm*), leaving it for the Chancery Division to add the name of the intended beneficiary. (And see *In the Goods of Walkley.*)

(iii) Allowed to rebut presumptions of law;

Extrinsic evidence will be admitted to rebut presumptions of law or equity, as the presumptions in favour of satisfaction of resulting trusts, and of ademption of legacies by portions, &c., to explain the meaning of signs or symbols, or nicknames used by the testator, to show that the will was executed on another date than that appearing on the face thereof. But it is not admissible to substitute one word for another, to enlarge the extent of terms, or to affect the construction of words, unless the context renders it impossible to accept the words in their ordinary sense. (See *Doe* d. *Hiscocks* v. *Hiscocks.*) Nor is it admissible to show that an illegitimate rather than a legitimate person was intended. (*Ingham* v. *Rayner.*)

(iv) Not allowed to substitute one word for another.

The whole will must be taken into consideration.

In endeavouring to ascertain the intention of the testator, the whole will must be looked at, and not merely particular expressions or detached passages. An intention so gathered will be strong enough to overcome the strict or literal meaning of the terms used by the testator, if the strict meaning would obviously frustrate the intention. (See *Abbott* v. *Middleton.*) But if the testator uses words which have a technical meaning, the technical meaning will be given to them, unless the testator has by his will beyond all doubt excluded the technical construction of them. (See *Towns* v. *Wentworth*; *Gordon* v. *Gordon.*)

The more favourable construction is to be taken.

When the words of the will may be fairly construed in two different ways, the more probable of the meanings will be put upon them. Thus, if one of the constructions would defeat, while the other would effectuate, the testator's intention, that will be adopted which will tend to carry out the intention.

As to rejecting, supplementing,

Words will sometimes be rejected, supplied, or changed, when this is absolutely necessary to give effect to the general intention

changing, and striking words out.

as collected from the whole will. But words will not be inserted or struck out, or in any manner altered, if they are clear and unambiguous, upon mere conjecture, or on the mere ground that the devise seems capricious, and that a gift in other terms would be in conformity with other dispositions in the will. Words will also be transposed, where necessary, to make sense and give effect to the will. Mistakes, however, will never be presumed if a reasonable construction can be found out.

The last clause prevails where inconsistent with previous one.

If two parts of a will are totally inconsistent and irreconcilable, the latter will prevail, on the principle that the testator may have changed his mind; but where a benefit is conferred in one part of the will in clear terms, which admit of no doubt, such benefit cannot afterwards be taken away, except by words which are just as clear and free from doubt. Thus, where there was a gift to children "except Thomas, the eldest son," and the eldest son's name was not Thomas, the exception was held void. (*Hodgson* v. *Clark.*)

When intention cannot be discovered, will is void.

Where it is impossible to discover from the words of a will what was meant to be given, or the person to be benefited, it will be void for uncertainty. Thus, if there is a gift by name, and a particular description superadded, and there is someone who answers to the name, and someone who answers to the description, no evidence of the testator's intention will be admissible, and the gift will be void for uncertainty. (*Doe* d. *Hiscocks* v. *Hiscocks.*) So, also, it will be if there is nothing to point to one person more than another. (*Drake* v. *Drake.*) Blanks cannot be supplied by extrinsic evidence; but the mere fact that the legatee's Christian name is left blank will not avoid the legacy if there is no doubt to whom the surname applies. (*Price* v. *Page;* and see *Re Boehm.*)

A will generally speaks from the death of the testator, so that the word "now" used in a will will usually refer to that time; but it may be otherwise when the context shows that the word refers to circumstances existing at the date the testator executed his will. (See hereon *Roland* v. *Edwards*, and *post*, p. 498.)

Construction of particular Phrases.

Introductory.

Such are some of the general rules which are laid down for the construction of wills. We will now proceed to enumerate

some of the meanings which the courts, following out these rules, and chiefly the rule that the testator's intention shall be effectuated, have put upon particular words, expressions, or phrases, dividing them into words, &c. connected with descriptions of persons, and words, &c. connected with descriptions of things.

As to descriptions of persons.

Where a gift is made to a person as filling a certain character, the fact that he does not fill that character will not avoid the legacy, unless the character was fraudulently assumed in order to deceive the testator. (*Wilkinson* v. *Joughin.*) A gift to the wife of A. means the wife which A. has at the date of the will, and no other, if A. has a wife living at the date of the will. (*Burrough's Trusts.*) A gift to "any husband with whom my daughter may intermarry" will include a husband who obtains a divorce from such daughter. (*Bullmore* v. *Wynter.*) And a gift to "my wife A." is effectual, though the wife after the date of the will obtains a decree of nullity. (*Boddington* v. *Clairat.*) A gift to husband and wife, and a third person, confers one-half the property on the wife and husband, and the other half on the third person, husband and wife being considered as one; and this construction has not been affected by the Married Women's Property Act, 1882. (See *Re Marsh's Estate; Mander* v. *Harris;* and *Jupp* v. *Buckwell;* and compare *Byram* v. *Tull.*)

Gifts to children.

A "child" *primâ facie* means a "legitimate child," and, in a gift to children generally, evidence will not be admitted to show that the testator may or must have meant illegitimate children. (*Durrand* v. *Friend.*)

When illegitimate children can take.

But illegitimate children may take if they have acquired the reputation of being the children of the person named in the gift; if, for instance, the bequest is to "the children of A. now living," and A. has no legitimate children, or if A. is dead and has only had illegitimate children. (See *Dover* v. *Alexander.*) But in a gift to children of a living person, illegitimate children will not be included, even though such person has only illegitimate children at the date of the will, and at the testator's death there is no possibility of others. (*Dorin* v. *Dorin; Penrose* v. *Manning.*) But a testator may show on the face of his will that he intends illegitimate children to take, and if he does so they will not be deprived of their benefits.

(See *Eagleton* v. *Horner* and *Danby* v. *Platt.*) Thus, if they are specially mentioned by name, or if to a gift to children generally there is added a mention of the illegitimate children by name, they will take. And where a testator described his illegitimate child as "his daughter," and placed her on a level with his legitimate daughter, providing for every member of his family then living, it was held that the illegitimate child took equally with the legitimate. (*Walsh* v. *Browne.* See also *Whitehead* v. *Stare.*) Again, if property is given "to my daughter A., the wife of B., and then for the children of my said daughter," and A. and B. are so related that they cannot by any possibility have legitimate children, the property will go to their illegitimate children, if any. (*Hill* v. *Crook;* and see *Re Ayler.*) As to gifts to future illegitimate children, these are void if made to illegitimate children begotten after the testator's death; but a gift to the future illegitimate children of the testator himself is good. (*Re Hastie's Trusts;* and see *Occleston* v. *Fullalove.*)

In determining whether children are legitimate or illegitimate, so that they may take or be excluded from a gift in favour of children by will, the law of the country where the children are domiciled is looked to, and this even though the gift is of real estate. (*Grey* v. *Stamford.*)

Children will include children of a former marriage.

Under a gift to children the children of a former marriage will take unless there is apparent an intention to exclude them (see *Lovejoy* v. *Carter*); so also will children by a subsequent marriage in the absence of such intention. But under such a gift grandchildren will not take, except in the case of a gift to the children of a person deceased who has only grandchildren living at the time of the gift. (*Berry* v. *Berry.*) Again, children already born will take under a gift to children "hereafter to be born," or "that may be born" (*Hebblethwaite* v. *Cartwright*); and a gift to children "surviving me" will not exclude those born after the testator's decease. (*Re Clarke.*)

Gifts to children as a class.

When an immediate gift is made to the children of any person, the class of children to take will be those existing at the testator's death, including a child *in ventre sa mère.* (*Viner* v. *Francis.*) If there are no children then existing, those coming into existence subsequently will take. If the gift is not to take

effect till after it has been enjoyed by a tenant for life, the class will include both children born in the lifetime of the testator, and those who come into *esse* before the tenant for life dies; but if no children are born before the death of the tenant for life, after-born children will be admitted, unless the testator's intention is clear that the distribution is to be made once for all when the fund falls into possession. If the gift is of a reversionary interest the class will be ascertained when the interest falls into possession. Suppose the gift is to children to be paid at twenty-one, or to such children who attain twenty-one, the class of children will be fixed at the testator's death, if any child has attained twenty-one in the testator's lifetime; if none has, then all born at the testator's death and coming into existence before the eldest attains twenty-one will take. This does not, however, hold good when the bequest is of the *income* of property. In this case, as the income can be periodically distributed among the members of the class as they attain twenty-one, and is not, like the corpus, bound to be paid once for all, the ascertainment of the class can be left till the last child attains twenty-one. (*Re Wenmouth.*) But if the gift is of a distinctive legacy to *each* of several children, the class to take is fixed at the death of the testator, whether possession is postponed to twenty-one or not. And in a gift to children who attain twenty-one after a prior life interest only, those will take who are *in esse* at the death of the tenant for life, or when the eldest attains twenty-one, whichever happens last. (*Clarke* v. *Clarke.*)

Some rules to determine what children take.

The class of children to take will not be extended by the mere addition of words of futurity, at least where the distribution is to take place at some period subsequent to the death of the testator. Thus, if there is a bequest to children "begotten" or "to be begotten" or "who may be born," only children will take who are born after the date of the will, and before the death of the testator, and not children born after his decease. (*Stoors* v. *Benbow.*) The rule is the same where the gift is after a life estate or to children "now born" or "those who may be born hereafter, who shall attain twenty-one." (*Iredale* v. *Iredale.* See also *Groves* v. *Musther.*) But in the case of an immediate devise to children "to be born hereafter," all children who ever come into existence will take. (*Mogg* v. *Mogg.*) This

will also be the case in a bequest of personalty, unless there is a gift of a lump sum to each of the children begotten or to be begotten. For here the distribution of not only what the children are to take, but of the whole of the estate, would be indefinitely postponed, and it will not be presumed that this was the testator's intention. (See *Butler* v. *Lowe*.) In such a case the class will be restricted to those *in esse* at the death of the testator.

Gifts to persons as tenants in common.

When a gift is made of personal estate to two or more persons as tenants in common, with a declaration that on all or any of their deaths before a stated time their respective shares shall be equally divided between their respective issue, and they die before the arrival of that time, leaving children, these children will take their shares *per stirpes; i. e.*, the fund will be divided into as many shares as there were tenants in common, and the issue will divide among them equally the shares of their respective parents. Thus, if there were three tenants in common, A., B., and C., and A. left three children, B. two, and C. one, the fund would be divided into three, and A.'s children would each take one-third of the third share of the fund, B.'s children one-half of such third share, and C.'s child the remaining third thereof. If there had been a special direction that the issue of the tenants in common were to take *per capita*, then the fund would have been divided into six parts, and each child would have received one-sixth.

If there is a gift to A. and B. as tenants in common for their lives, and at their deaths to the children and grandchildren, the children will take *per stirpes*, *i. e.*, whatever the number of the members of each family may be, each will divide between them the share of their parent; but the grandchildren will take *per capita*, *i. e.*, they will take the fund after the death of their parents in shares according to their number. (*Barnaby* v. *Tassel.*) But if the gift to the children is not till after the decease of the survivor of the tenants for life they will take *per stirpes*. (*Malcolm* v. *Martin.*)

Gifts to nephews and nieces.

A nephew or a niece means *primâ facie* the child of a brother or sister. But if at the date of the testator's will and at his death he has no nephew of his own, and there are nephews and nieces of his wife, they will take under this designation, and

evidence that they were not intended will not be admitted (*Wells* v. *Wells*; see also *Smith* v. *Gue*; and *Ingham* v. *Rayner*); and they may take by name and under the description of nephews and nieces where it appears from the circumstances that they were intended to take, even though there be nephews and nieces of the testator himself of the same name. (*Grant* v. *Grant*.) Great nephews and nieces will be included where the intention is evident. (*Re Blower*.) So will half-nephews. (*Kitchin* v. *Myers*.)

Gifts to cousins.

Cousins means "first cousins" in the absence of a different intention.

A first cousin is the child of an uncle or aunt, while a second cousin is one descended from the same great-grandfather or great-grandmother. The children of first cousins stand to each other in the relationship of second cousins; but the children of a testator's first cousin stand to him in the relationship of first cousins once removed. As a rule, under a gift to a testator's first and second cousins, first cousins twice removed will not be entitled.

Gifts to grandchildren.

In the absence of intention to the contrary, a grandchild will not include a great-grandchild. The word "issue" is a term of vague import. It may mean children, grandchildren, &c., but its extent will always be controlled by the context. Thus, if the testator directs that the issue are to take the parents' share, it will be confined to the more restricted meaning of children. (See *Martin* v. *Holgate*; *Macgregor* v. *Macgregor*.) But a gift to the issue lawfully begotten of A. will not necessarily confine the gift to A.'s children. (*Jones* v. *Evans*.)

Gifts to relations.

The words "relations" or "near relations," too, are terms of very indefinite meaning. In the absence of anything to extend their meaning, they will only comprehend those who would have a claim as next of kin under the Statute of Distributions, and they will take *per capita*. The expression will be further restricted by the use of the adjective "poor," and in such a case only those who could take under the Statute of Distributions, and who are also in want of assistance, will take. Further, the term will only comprise blood relations, and not relations by affinity, or illegitimate relations, unless on the construction of the whole will it is evident that the testator intended to include illegitimate relations. (*Joddrell* v. *Seal*.) The meaning of the

word "family" varies with the context. It is generally construed in a limited sense, and means children. It may, in cases of gifts of personal property, mean "next of kin," where there are no children. (*Re Maxton.*) And sometimes when, from the general scope of the will, it is not clear whom the testator meant, a gift to a family will be void for uncertainty. (*Yeap Chean Neo* v. *Ong Cheng Neo.*)

Gifts to heirs.

A gift of personalty to the testator's "heir," or the "heir" of some other person, will vest the gift in such heir, as he takes as having been specially named, or as a *persona designata*. But if the testator's meaning, as apparent from the will, is that he intended to give to the beneficiary an absolute interest, the addition of the word "heir" will not take away from such interest. Thus, if there is a gift to A. for life, and then to his heirs, as he shall give it by will, or if he dies without a will to his right heirs, here A. will take the absolute interest. (*Powell* v. *Boggis.*) So a gift to A. for life, and then to his heirs, or after his death to his heirs, will operate for the benefit of his personal representatives according to the Statute of Distributions. (*Gittings* v. *McDermott.*)

Gifts to next of kin.

The words "next of kin" do not mean persons who would, in case of intestacy, be entitled under the Statute of Distributions, but those who, whether of the whole or the half-blood, are nearest in degree of personal propinquity, so that it excludes the children of a deceased brother or sister, if there be a brother or sister living. If there is a gift to the next of kin according to the Statute of Distributions, this will exclude either a husband or wife, and a gift to persons entitled as next of kin, or otherwise under the statute, will not include the husbands of such persons, as a husband "claims by right paramount," independently of any statute. (*Milne* v. *Gilbart.*)

Gifts to legal representatives.

The phrase representatives, or legal representatives, generally means the executors or administrators, and not the next of kin. (*Cumberlege* v. *Cumberlege-Ware.*) But the testator's intention, as derived from the whole will, will here again control the meaning; and gifts to them, or even to executors and administrators, have been held to mean the next of kin under the Statute of Distributions as being the persons who "represent" the testator in a popular sense (*Bridge* v. *Abbott*; *Palin* v. *Hill*; *Eagleton*

v. *Horner*), and this will especially be the case where the words "share and share alike," or other like phrases, are used. (*King* v. *Cleveland*.)

Gifts to executors.

A gift to executors is a gift to them in that character, and they are not entitled to the legacy if they decline or are incapable to act. But the mere taking out probate will entitle the executor to the gift, unless he acts fraudulently. (*Harford* v. *Browning*.) When, however, the gift is given to him under the description of "my friend and executor," he will take the gift, though he declines to act as executor (*Bubb* v. *Yelverton*); this will be the case, too, where a legacy is given to one of several executors, and not to the others (*Cockerell* v. *Barber*), or if the gift consists of a residue. (*Christian* v. *Devereux*.) In *Crawford* v. *Crawford*, where a gift to an executor was expressed to be for his trouble as executor, and as a mark of friendship, the executor was held entitled to the gift, though he did not act.

When they take beneficially.

Executors sometimes will, and sometimes will not, take beneficially under a gift to them. If the gift is made to them by name, or subject to certain payments, they will take beneficially, and this even where prior legacies have been given to them. But if there is a direction that they are to retain their costs, or to distribute the property as may appear just to them, the inference will be that they are not intended to take beneficially, but as trustees for the next of kin. And where a legacy is given to A., and if he dies in the testator's lifetime to his executors or administrators, and A. does so die, his executors will take the legacy as executors for the benefit of A.'s residuary legatees, and not as trustees for A.'s next of kin. (*Clay* v. *Clay*.)

As to the description of the subject-matter of a gift.

We will now turn to words and expressions used in wills to describe things devised or bequeathed, and see what construction has been put upon a few of them most commonly in use by the courts. Generally, it may be said that where there is a correct and specific description of the property given by the will, a mistake in any additional words will have no effect; but where there is first a general description, and this is followed by other words, these other words may restrict it or explain it, or otherwise modify it. (See *Whitefield* v. *Langdale*.)

Usual meaning of—(i) Estate;

The word "estate" used alone will be sufficient to carry both real and personal estate, but the context may control its meaning.

Thus, if used in conjunction with the word "effects," or if the gift of the estate is to trustees on trusts exclusively applicable to personal property, real property will not pass. In *Stokes* v. *Salomons*, however, where the testator devised and bequeathed his estate and effects to A. to be "paid and transferred" to him on attaining twenty-one, though the words "paid and transferred" would seem to apply only to personal estate, it was held, mainly on account of the employment of the word "devise," that the copyholds also passed. But a different decision was given in *Coard* v. *Henderson*, where the word "devise" was not used.

(ii) Effects; The word "effects" will carry the personalty only, unless the testator shows that he has used it in an inaccurate sense and intended to pass realty as well. A devise of the rents or income of property will pass the fee simple in the land itself. (*Mannox* v. *Greener*.) If you intend to give the residue of the real, as well as the personal, estate, take care not merely to say, "I con-

(iii) Legatee; stitute A. my residuary *legatee*." In such a case A. will get only the residue of the personal estate, as the word "legatee" is only applicable to that kind of property. (*Windus* v. *Windus*.) The context will enlarge as well as restrain the effect of the words used. Thus, the expression "personal estates" has been, in the light of the context, held to include realty (*Doe* v. *Topfield*), and "real estates" in Middlesex to include leaseholds there. (*Greenwell* v. *Davidson*.) A gift of "all things I possess" was held to pass a freehold estate acquired by the testator after the date of his will. (*Arnold* v. *Brady*.) With reference to special descriptions of property, the rule will apply "*falsa demonstratio non nocet*," so that where a testator devised lands at S., which "were given me by my brother's will," it was held that the devise was not to be confined to what he had taken under the will of his brother. (*Welby* v. *Welby*.)

(iv) Money; The word "money" is a very ambiguous word, which you should not employ without caution. It will include notes payable to bearer, exchequer bills, bills of exchange indorsed in blank, bank notes, money at a bank on a current account, as well as money on deposit. But it will not include choses in action, such as government securities, promissory notes not payable to bearer, or stock in the funds, unless its meaning is enlarged by the context, or the testator has, at the date of his

will and of his death, no money properly so called. (*Chapman* v. *Reynolds*; *Collins* v. *Collins*.) But sometimes money will be construed in a large sense, as meaning the residuary personal estate. A gift of "the whole of my money" will, as a rule, only pass money properly so called. But if a direction to pay debts or legacies has been given, and the rest of the money is then given, this will pass the whole of the personal estate. (*Stocks* v. *Barrei*; *Montague* v. *Earl of Sandwich*.) In *In re Cadogan*, under a gift of the "money of which the testator was possessed," all personalty, pure and impure, was held to pass. As to "money at my bankers," see *Waddilove* v. *Waddilove*.

(v) "Whole of my money;"

"Ready money" will include not only cash in the house but money in a bank payable on demand; but it will not pass notes of hand, promissory notes, or debts due to the testator. (*Re Powell*.)

(vi) Ready money;

A gift of a desk and its contents was held in *Re Robson* to pass to the legatee such choses in action contained in the desk as would have been good subjects of a *donatio mortis causâ*.

(vii) Gift of a desk and its contents.

"Securities for money" will not pass an account current at a bank, or on deposit there, I O U's, shares, bank stock, mere debts, or a lien for unpaid purchase-money. But under the expression "mortgages or securities for money," the legal estate in the mortgaged premises will pass, whether there are words of limitation or not, unless it is apparent that the money alone is given. (*Re Field*; *Re King*.) So also will money due to a testator in respect of which he has, as a vendor, a lien for unpaid purchase-money. (*Callow* v. *Callow*.) It is doubtful if the legal estate will pass when the terms used in the gift are "moneys on security." But it will apparently pass when the donee is to receive money on security, and in all cases where the testator's evident intention was to place the beneficiary in his own position so as to enable him to compel payment of the debt.

(viii) Securities for money;

The gift of the income of a fund will carry the *corpus* as well as the income (*Humphrey* v. *Humphrey*); but the bequest of a certain specified sum due upon a particular security will not pass any part of the interest which may be owing at the testator's death, or at the date of the will. Yet a bequest of a bond,

(ix) Income of a fund;

or money owing on a bond, or of a mortgage, will carry arrears of interest due at the testator's death.

(x) Furniture; The word "furniture" *primâ facie* means only furniture reserved for domestic or personal use. (*Farrant* v. *Spencer*.) It will include plate, linen, and pictures, but not wines or books, nor goods in a house of business which belong merely to the business.

(xi) Household goods; The expression "household goods" will comprehend all things of the household which are not fixtures, or of such a nature that they are consumed in being enjoyed, or merely articles used in the testator's trade or business.

(xii) Household effects; The term "household effects" is of a wider significance, and used in conjunction with household furniture will include such things as wines. (*Bourne* v. *Brandreth*.) Curiously enough, a telescope has been held to pass as household furniture; and under a bequest of pictures and books in or about the testator's house, pictures at a dealer's to be cleaned, and books sent to be rebound, though not in the house at the testator's death, have been held to pass. But a gift of household furniture and effects was held in *Northey* v. *Paxton* not to include jewellery. (See also *Daniel* v. *Daniel*, *Re Miller*.)

It would hardly be necessary to say that horses, cows, and sheep will not pass under a bequest of household effects, were it not that the point was raised in *Johnson* v. *Johnson*.

(xiii) Goods, chattels, or effects. The term "goods, chattels, or effects" used alone will carry all the personal estate, unless their meaning is limited, as by describing them as goods, &c., in a particular locality or at a particular place, or by prefixing or affixing to them other words. If they follow words of a narrower import, they will be confined to mean property *ejusdem generis* with the property previously described, unless the bequest is a residuary one. In this last case, where there is a gift of "residuary estate" or "personal estate," followed by an enumeration of certain specific articles, they will not lessen the effect of the gift as a residue, but will be considered as a defective enumeration of the articles which the testator thought such residue was comprised of. (See *Dean* v. *Godson*.) Where A. "devised and bequeathed" to B. all his goods, chattels, and effects, and directed that after his death the furniture, moneys, and "property" to which B.

became entitled under his will should be divided among B.'s children, it was held that the will passed A.'s real estate on account of the use of the words "devise" and "property." (*Hall* v. *Hall.*) Railway stock will pass under a gift of railway shares (*Morrice* v. *Aylmer*), but debentures will not include debenture stock. (*Attree* v. *Hawe; Bodman* v. *Bodman.*)

The meaning of some other words and expressions usually occurring in wills.

What will pass under "residue,"

A gift of a "residue" will pass everything not disposed of, whether the testator has attempted to dispose of it or not; and even where it is of a residue "not otherwise disposed of" it will mean "not otherwise effectually disposed of." (*Green* v. *Dunn.*) It will include lapsed legacies, &c., unless there is an inference that it was intended that it should not do so. Thus, if the residue given is the residue remaining after the payment of certain legacies, and that is the only residue given, it will not include the legacies if they lapse. (*Easum* v. *Appleford.*)

and "share."

In a gift to a class, with a direction that on the death of a member thereof his share shall go over to the others, the word "share" will only include an original share, and not an accruing one, unless the words "and interest" be added, or there be other indications that it was the intention that accruing as well as original shares should go over. (*Douglas* v. *Andrews.*)

The meaning of the words "survivor or survivors;"

"Other or others;"

The words "survivor or survivors" must be used with caution. The difficulty which occurs about them may be illustrated by the following example:—Suppose property is given equally among A., B., and C., with a gift over of the shares of any of them dying under twenty-one to the survivor or survivors. A. attains twenty-one and dies. Then B. dies under twenty-one. If the word survivor is to be construed literally, B.'s share will go wholly to C., to the exclusion of the representatives of A. But it might be construed "other or others," and in this case the representatives of A. would take a share. In order to effectuate the intention of the testator, the courts will generally hold these words to signify "other or others" when it is necessary to give them that construction to effect such intention. (See *Wake* v. *Varah.*) The rule seems to be that if there is an absolute gift to several persons, with a gift to the survivors if any die without issue, "survivors" is construed in its ordinary sense; but if there is a gift over to take place only in case the event on which the property is limited to the first legatees

(among whom there is to be survivorship) happens in respect of all the legatees, "survivors" will be construed "others."

Another question in connection with survivors is, when is the class of survivors among whom property is to be divided to be ascertained? The rule is that this question is to be referred to the period designated for the division of the property. Thus, if property is given to A., B., and C. or the survivors, those will take who survive the testator. If it is given to A. for life, and after the death of A. to B., C., and D. or the survivors, those will take who survive A., unless A. die before the testator, when those who survive the testator will take.

"Die unmarried;"

The expression "die unmarried," and other kindred expressions, need careful handling. They ordinarily mean, when used in wills, "death without ever having been married," but may also bear the interpretation "not being actually married at any particular time." The circumstances of each particular case will determine which meaning the expression used is to bear. Thus, where property was given to A. and B., and, in the event of the decease of either of them unmarried, and without leaving lawful issue, to the survivor, it was held that "unmarried" meant "not under coverture at the time of death," and not "never having been married." (*Salisbury* v. *Ridley.*) If there is a gift to A. at twenty-one or on marriage, and a gift over on death unmarried and without issue, this will mean without ever having been married, and the gift over will be defeated if he has married, but has no wife at the testator's decease. But if A. were already married at the date of the testator's will, the expression could not bear this construction, and the gift over would take effect should he not happen to have a wife at the testator's death, unless circumstances showed that the testator could be presumed to have intended to refer to the legatee's making a second marriage. (See *Crosthwaite* v. *Dean.*) But in a gift to A. for life, remainder to his children, and if he die unmarried and without issue, to B., here B. will take if A. has no wife living and no children at his (A.'s) death, and not merely in the case of A.'s not marrying at all. (See *Re Sanders.*)

and of the word "or."

"And" will sometimes be construed "or" in gifts over. Thus, if there is a gift to A., and if he die unmarried and without children, to B., here if unmarried be read "without ever

having been married," the "and" need not be read "or" as he could not in such a case have children. But if "unmarried" be read "not being married at his death," "and" will be read "or," so that if he does marry and leaves issue the gift over will not take effect. (*Bell* v. *Phyn.*) Sometimes, too, "or" will be read "and." Thus, if property is devised to A. in fee, if she dies leaving lawful issue, but, if she dies under age or without leaving issue over, "or" will be construed "and." So also will it be where there is a devise to A. in fee, and if he dies under twenty-one or without issue, then over to B.

The court will in some cases supply words omitted by oversight from a will. (See *Davies* v. *Hetherington.*)

II. The Contents of a Will.

We now propose to imagine that you have received instructions from a client to draw his will, and shall proceed to point out some of the most important points of law which you must ever have before your mind's eye in preparing it.

Clause of Revocation.

Why the clause should be inserted.

It is well to begin with a clause revoking all prior wills, as it may happen that there are other wills or testamentary papers of your client extant; and these would be entitled to probate so far as not inconsistent with the will under preparation.

If a clause revoking all prior wills is inserted, such prior wills cannot be admitted to probate, even though the testator may have intended that they should be. (See *Collins* v. *Tuffley.*)

The Date of a Will.

No date is necessary.

A date is not necessary, and parol evidence will be received to assist in determining the period of its execution should any question arise whether it was executed prior or subsequently to another will by the same testator. To save disputes, however, the date should always be added.

Date from which will takes effect.

As to the date from which a will speaks and takes effect, sect. 24 of the Wills Act provides that it shall so speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention appear by the will. And by sect. 3 of the Married Women's Property Act, 1893, this provision applies now to the wills of married women disposing of property under the provisions of the Married Women's Property Act, 1882, so that such a will will pass property acquired by the testator after her husband's death without the necessity of any re-execution, as was held to be necessary in *Stafford* v. *Stafford*, *Re Price*. This provision of the Wills Act only relates to the effect of a disposition of property by the will, and will not, for instance, render valid a will executed by a testator during his minority, and who afterwards attains majority before his death.

What is a contrary intention?

What is a contrary intention within the section? The general rule is that the use of the word "now" will not alone be deemed to refer to the date of the will. So that where a testator devised all the property "I *now* possess," it was nevertheless held that property acquired subsequently to the date of the will would pass. (*Wagstaffe* v. *Wagstaffe*; *Castle* v. *Fox*; *Re Portal and Lamb*; *Cole* v. *Scott*; and see *Blades* v. *Arnold*.) Again, a gift of "my new 3½ per cent. annuities" has been held to pass all the annuities of that description which the testator possessed at the time of his death (*Goodland* v. *Burnett*); and a gift of all the money which the testator has in a certain bank will pass all the money which he has in that bank at his death. (*Hepburn* v. *Skirving*.) Where there is a devise of specific leaseholds, and the testator afterwards acquires the freehold reversion, the fee simple will pass to the legatee (*Saxton* v. *Saxton*), unless it can be gathered from the will that the testator only intended to deal with leaseholds. (*Pierce* v. *Harrison*.) Where a testator devised lands to B., and subsequently to the date of his will sold them, and took a mortgage of the lands to secure a part of the purchase-money, and died without having altered his will, it was held that B. was not entitled to the mortgage money. (*Re Clowes*.) The will of a testator who afterwards becomes a lunatic speaks from its date, and not from the death of the testator. (*Wheeler* v. *Thomas*.) In *Roland* v. *Edwards*, where A. be-

queathed a leasehold house, "where he then resided," called the Anchor Inn, to B., and had, previous to the making of the will, altered the house, turning part of it into a shop, and had subleased the shop *after* the date of the will, the court held that the shop passed with the inn to B., on the ground that the circumstances existing at the date of the will, not those at the time of the testator's decease, were to be considered, and at the former period the testator was the only person occupying the premises.

By sect. 25 of the Wills Act, when a devise fails by reason of the death of the devisee in the lifetime of the testator, or because it is contrary to law, or otherwise incapable of taking effect, the property comprised in the devise will be included in the residuary devise, if there be any in the will. This section, however, does not probably apply to cases where the testator exercises a power of appointment by will, and the appointee dies before him; in such a case the claim of the persons entitled in default will probably prevail; but see *Coxon* v. *Rowland*, where, by the exercise of a general power, it was held that the testatrix had made the property her own, and, the appointee dying in her lifetime, that the property appointed formed part of her estate. (See also *Thomas* v. *McKenzie*.)

The Appointment of Executors.

Executors not absolutely essential.

The omission to appoint executors will not invalidate the will, and administration *cum testamento annexo* will be granted. The effect of appointing a debtor of the testator to be executor destroys the remedy against him at law for the debt, except as against creditors of the testator; but it does not operate to release him in equity as against legatees. He becomes a trustee of the debt for the persons interested in the estate, and is answerable for it as assets in his hands. An executor has, under sect. 21 of the Trustee Act, 1893, full powers to pay or allow debts or claims on any evidence he thinks sufficient, and to compound, &c. therefor.

Who can be appointed executor.

Though persons under legal disability, except lunatics and idiots, are not incompetent to act as executors, you should not appoint any of such persons to the office. An infant executor,

for instance, cannot act till he attains majority, and meanwhile it would be necessary for administration to be granted to his guardian or some other person *cum testamento annexo*. Married women may now, in consequence of the Married Women's Property Act, 1882, accept the office without the consent of their husbands; but they are not, as a rule, desirable executors, and the same remark applies to single women.

The Direction to pay Debts.

Such direction really superfluous.

A will often commences with a direction to the executors to pay the testator's just debts, funeral and testamentary expenses. This direction is, to a great extent, superfluous, as they are bound to pay the debts by virtue of their office. Perhaps, however, the use of the word "just" would prevent the executors from exercising the power which they have of paying debts barred by the Statute of Limitations. (See *Hill* v. *Walker; Stalkschmidt* v. *Lett.*) And it has been held that a direction to pay debts, even without any reference to legacies, enables a legatee-creditor to obtain his legacy as well as his debt in a case where, but for that direction, he would, by virtue of the equitable doctrine of satisfaction, have been entitled to the legacy only. (*Bradshaw* v. *Huish.*) A *bequest* of personalty on trust to pay debts did not, even before the Trustee Act, 1888, s. 8, prevent the operation of the Statute of Limitations. (*Scott* v. *Jones.*) Nor has a *devise* on trust to pay debts since the Real Property Limitation Act, 1874. (Sect. 10.)

What constitutes a Charge of Debts on the Realty.

What will constitute such a charge.

As to what will amount to a charge of debts on realty, any intention that the testator's debts should be paid by any other persons than the executors will have this effect. Thus, a general direction that the debts shall be paid will so charge them, unless it be given to the executors alone; even in this case the realty will be charged, if at the same time it is devised to the executors, unless it be devised to one only of several executors, or they take unequally, or part only of the realty is given to them and part to someone else. (*Re Bailey;* and see *Bate* v. *Bate.*) When there is a general charge of debts or legacies on real estate,

When executors have power to sell lands.

executors have in equity an implied power to sell it, and to give valid receipts for the purchase-money, but they cannot convey the legal estate. But, as we have seen, by 22 & 23 Vict. c. 35, s. 16, when there is such a charge, and the real estate is not so devised as that the whole interest of the testator therein becomes vested in any trustee or trustees, the executors have power to raise money to pay debts and legacies by sale or mortgage. But whether this power renders it unnecessary to get in any outstanding subsisting legal estate is not clear, and until it has been decided that it does, it is well for a purchaser or mortgagee to require the concurrence of the heir or devisee of the property. A devise or trust for the payment of debts will not raise a trust for the payment of debts barred by the Statute of Limitations before the testator's death. As to those not barred at his death, it will not prevent the statute from running either as to real or personal estate. (Sect. 10 of 37 & 38 Vict. c. 57.)

The carrying on of the Testator's Trade or Business.

Usual practice to provide for the carrying on of the business.

Executors carrying on the testator's trade or business without such directions will commit a breach of trust, except under special circumstances (*Re Chancellor*), or for a temporary purpose. (*Kirkman* v. *Boothe.*) And even under such directions they will be personally responsible to the creditors with whom they deal, with the right to recoup themselves out of any property set apart by the will for the purposes of the business (*Lucas* v. *Williams*), and if no part set aside, then apparently out of the general assets. In *Dowse* v. *Gorton*, where a testator had empowered his executors to carry on his business, the court held that the private creditors of the testator had priority over the trade creditors as to the assets existing at the testator's death; and that as to the assets subsequently acquired, the trade creditors had priority over the private creditors. Owing to the executors' personal liability, it is generally the practice to appoint a special executor, and to empower him to carry on the business, such special executor usually being the person for whose benefit the business is to be continued. Sometimes it is directed that only part of the testator's estate shall be employed in trade; and when this is

the case that part only will be liable, in exclusion of the general assets; while, if the executor employs a larger sum than that authorized, the excess, if he becomes bankrupt, may be proved as a debt under his bankruptcy. (*Ex parte Garland;* see also *Barney* v. *Barney*, and *Frisby* v. *Owen*.)

The Bequest of Legacies.

Usual bequest to wife.

The early part of a will is generally devoted to the bequeathing of legacies. The household furniture and plate, &c. is often left to the widow absolutely or for her life, with a direction that on her death or re-marriage they shall fall into the residue, or be divided among the children, or given to some particular child. In this last case it is the duty of the executors, in the absence of direction to the contrary, to take an inventory of the household furniture, &c. so left, in order that when the period for division comes there may be no dispute as to what furniture belongs to the testator's estate and what to his widow's. If it is desired that the executors should insure the furniture against fire, a clause to this effect should be inserted, since, if the duty is not cast upon the executors by the will, while they may insure the furniture under sect. 18 of the Trustee Act, 1893, they are not compelled to do so.

The various Kinds of Legacies.

We take it for granted that you are acquainted with the main distinctions between general, specific, and demonstrative legacies, and understand that where there is a deficiency of assets, the first to suffer is the residuary legatee, then the general legatee, and then the specific and demonstrative legatees together; and also that a specific legacy is liable to be adeemed by the act of the testator in his lifetime, while a general legacy is not liable to ademption; and that a demonstrative legacy will not be lost merely by the fact that the fund out of which it is to be paid does not exist at the testator's death. But it is by no means easy to say in all cases into which class a particular legacy falls; and further, it is sometimes difficult to say what amounts to ademption.

What is a specific, demonstrative,

A difficulty sometimes arises as to whether a legacy is specific, demonstrative, or general: this happens most frequently in

and general legacy.

those cases where a sum of money or stock is bequeathed by will. In these cases the legacy will not be specific unless the stock or special sum of money is existing at the date of the will, and it is clear that the testator refers to it as a distinct thing set aside from his general estate, and intends that that particular stock or sum shall pass. Thus, a mere legacy of 1,000*l.* stock is not a specific legacy, though the testator have that exact amount of stock at the date of the will; but if the testator gives a legacy of stock generally, and then gives the rest of stock "standing in my name," the earlier legacies will be specific. (See *Millard* v. *Bailey*.) And if the testator directs a purchase of stock to be made, should he not have sufficient stock to answer legacies thereof previously given, this will show that he meant to give something in existence at the time, and will make the legacy specific. (*Townsend* v. *Martin*.) A gift of "my" stock is a specific gift thereof; so also is the gift of part of a specific sum, or of money out of specific money, or of stock out of specific stock. But a gift of money out of stock is a demonstrative legacy. A gift of 1,000*l.* "of my stock" will be specific, if the testator can be understood as estimating his stock at the value of 1,000*l.*; but it will be demonstrative if his intention appears to have been to give 1,000*l.* payable out of his stock. (See *Davies* v. *Fowler*.) Again, a gift of "the" 1,000*l.* out on mortgage is specific; but a gift of 1,000*l.* "now invested" in a certain way will not be so. However, a gift of "1,000*l.* or thereabouts," invested in a certain way, will be specific, as the testator's apparent intention is to give the investment rather than the mere sum of money. (See *Kermode* v. *Macdonald*.)

Illustrative cases.

Residuary devise is specific; but a residuary bequest is not.

You should note that a devise of land is specific, even if given by way of residue. (See *Lancefield* v. *Iggulden*.) But as to personal estate, a mere enumeration of specific things in a residuary bequest will not make a gift of those things specific, unless it is something more than an enumeration, as where the specific things are distinguished from the residue by some such words as "as well as," "together with," "or," and "also." Thus, if a testator gives "all my leases, furniture, stock-in-trade, and all my estate and effects," the gift is a whole and entire one, and is residuary. (*Botthamley* v. *Sherson*.)

Care must be taken to

The moral to be derived from the above is, that whenever the

describe a specific legacy expressly.

testator wishes to give a specific legacy, and the nature of the subject-matter of the gift is such that doubts may subsequently arise as to whether the gift is general or specific, you should take care expressly to state that it is given as a specific legacy.

Ademption of a specific legacy.

A specific legacy is liable to be adeemed. If the subject-matter of the gift does not exist at the testator's death, there is nothing for the legatee to take, and so he will get nothing, and moreover he will not be entitled to any compensation for his disappointment out of the rest of the testator's general assets. But a specific legacy is also adeemed if it is changed by the testator into something else, though that into which it is changed is in existence at the testator's death. Thus, if a man by his will gives a debt to A., and the debt is paid in his (the testator's) lifetime, and with the money received he buys a horse, the horse will not pass to A. (Sir G. Jessel, in *Harrison* v. *Jackson*); or, if he gives A. 1,000*l.* consols, and by a codicil states that for such gift he substitutes 1,000*l.* Bank stock specifically, and before his death he sells the latter, A. will get nothing, not even the 1,000*l.* consols bequeathed by the will, though they are still extant. (*Marquis of Hertford* v. *Lowther*.) And in the above-mentioned case of *Harrison* v. *Jackson*, where a testator bequeathed to A. 1,000*l.* of certain railway stock standing in the name of trustees, with which he had power to deal, and which he had intended to transfer into his own name, but before he could do so the stock was redeemed and paid off at par, and the proceeds were invested by the testator in other railway stock, it was held that A. was entitled to nothing, as the legacy had been adeemed by the change. But a change made in the specific thing bequeathed, which leaves it to all intents and purposes the same as it was before, as where by a resolution of the company shares were converted into stock, will not affect an ademption; nor, apparently, will a mere change of investment of security on which a fund specifically bequeathed is invested, unless the testator receives the money and invests it, or lends it on security for his own purposes. (*Jones* v. *Southgate*.) If goods in a particular house or place are bequeathed, and are subsequently removed to another house or place, the gift will not be adeemed if it appear that the goods themselves were meant to form the subject of the bequest, and to be enjoyed without

Illustrative cases.

any connection with the place in which they are described as being. But if the intention seems to be that the goods were to be enjoyed in connection with the place in which they are said to be, as where both goods and house are given to the legatee, the permanent (but not the mere temporary) removal of them to another place will effect an ademption. (*Spencer* v. *Spencer*.)

Specific legacies are taken free from liabilities.

In connection with specific legacies of personalty, note that the legatee is entitled to receive the legacy free from all liabilities created by the testator, so that if the testator has pledged it the legatee is entitled to compensation out of the general estate, or if costs are incurred by the executors in obtaining payment of the money specifically given, those costs must be paid out of the residue. (*Hood* v. *Hall*.) But if the liability is one which is incident to the subject-matter of the gift itself, the legatee must take it with the liability. Thus, a specific legatee of shares must pay all calls thereon made after the testator's death. The rule that the legatee is entitled to his legacy free from liabilities does not apply to gifts of real or leasehold property, subject to mortgages or liens for unpaid purchase-money, or some other equitable charge (see *Anthony* v. *Anthony*); for, in the absence of contrary intention, the donee will take them *cum onere*. (See 17 & 18 Vict. c. 113; 30 & 31 Vict. c. 69; 40 & 41 Vict. c. 34.)

From what Time Legacies carry Interest.

Specific legacies from death.

We will now turn to another point arising in connection with legacies, viz., the payment of interest on legacies. As to specific legacies, if the legacy yield interest, the legatee is entitled to interest thereon until payment from the time of the testator's death. Thus, a specific legatee of stock takes the dividends on the stock from the death of the testator.

General legacies from one year after death.

But with regard to general legacies (including demonstrative legacies), if no time is specified, they will carry interest at the rate of 4*l*. per cent. from the expiration of a year from such death; this year being allowed to the executors to pay the debts, and put the estate in order for administration. If a time for payment is expressly named, the legacy will not, of course, carry interest before the appointed period. There are, however, some exceptions to the rule. Thus, when the testator is the father, or is *in loco parentis* to the

Exceptions: (i) Legacy to a child;

(ii) Interest is given by way of maintenance;

(iii) Legacies given in satisfaction of debts.

legatee, the latter being an infant, interest is payable from the testator's death. So, too, the legacy will bear interest from that date, when the legatee, though a stranger, is an infant, and maintenance is given out of the legacy, or where the legacy is given for value, *e.g.*, in satisfaction of a debt. The interest is allowed, in the first two cases, in order that the infant may have a fund wherewith to support himself till he can take the legacy itself, and in the last case as the substitution for the interest which would have been payable on the debt. But where a legacy was given by a testator to his wife in lieu of dower, in spite of this rule, it was held that the legacy carried interest only from one year from the testator's death. (*Re Bignold;* and see *Greenwood* v. *Greenwood.*) If the legacy be payable at a future day, whether it be vested or not, it will as a rule only carry interest from the time fixed for its payment. But there will be exceptions, again, to this rule when the legatee is an infant child of the testator, and the will provides no distinct fund for maintenance; and where the legatees are strangers to the testator, if there is a general intention expressed that maintenance is to be provided for them out of their legacies; also where a fund is directed to be at once set apart from the rest of the testator's estate. But where the testator has otherwise provided for the maintenance of his infant children, they cannot claim interest before the period appointed for the payment of the legacy. The doctrine which entitles children to interest by way of maintenance will not, of course, extend to adults, nor as a rule to infants whose parents are living, unless in this last case the testator by his acts has evinced an intention to put himself in the relationship of a parent to those infants as regards the providing for them. (See *Powys* v. *Mansfield.*) In *Long* v. *Gardner*, a legacy was given to an infant for acting as executor, and it was held that interest on the legacy did not begin to run until the infant attained the age of twenty-one.

Provisions of the Conveyancing Act as to maintenance.

The remarks above made are, however, subject to the provisions of the Conveyancing Act, 1881, s. 43, as to maintenance, which enacts, that where property is held by trustees for an infant for life, or greater interest, whether absolutely or contingently on his attaining twenty-one, or on the occurrence of any event before his attaining that age, the trustees may pay

the parent or guardian or apply towards the infant's maintenance the income of the property, whether there is any other fund applicable to the same purpose or any person bound by law to provide for the infant's maintenance or not. This section has been already fully commented on in connection with settlements (*ante*, pp. 404—406).

Maintenance by court out of legacy.

But where the special fund nominated by the testator for the maintenance of his infant child is insufficient, and the legacy is vested, the court would always allow maintenance, even though the surplus interest was directed to accumulate. Further, where the legatee is a stranger to the testator, and no maintenance is given, and there is a limitation over to others, interest will be allowed for maintenance if those others consent. And, where there is no limitation over, but all or some of the class of legatees must absolutely take the fund, there, as all have an equal chance of taking, interest will be allowed for maintenance, if the father of the legatees is unable to support them.

(iv) Legacy charged on land.

Another case in which interest is payable on a legacy from the testator's death is where the legacy is charged on land. But this is not the case if it is charged on the proceeds of the sale of land directed to be sold; here interest will run from the expiration of one year from the testator's death.

As to payment of annuities.

An annuity begins to run from the death of the testator, and the first payment is due one year after his death. (*Bott* v. *Gibson*.) But if it is directed to be paid monthly or quarterly, instalments will be payable at the end of the first month or quarter, and so on.

Legacy duty.

If the testator wishes that the legatee should receive his legacy free from legacy duty, you should take care to insert a declaration to this effect in the will, otherwise the legatee will have to pay such duty. If the gift be made "free from deduction," or "free from expense," or of a "clear" legacy or sum, or of a fund to produce a "clear annual sum," in these cases the duty will be payable out of the testator's estate. Inasmuch as legacies charged upon land or the proceeds of land are now chargeable with succession duty and not legacy duty, some such clause as the one suggested by the Council of the Law Society, and set forth *post*, p. 534, should be inserted in a case where the

testator directs all his properties to be realized, and the debts and legacies paid out of the proceeds.

Several Legacies to the same Person.

Two legacies to same person.

When a testator gives two legacies to the same person, a question may arise whether such legacies are cumulative or substitutional. The rules on this point are, first, that legacies of equal amount given by the *same* instrument are merely repetitions, unless there is an apparent intention to give both.

Sometimes cumulative.

Parol evidence will be admitted to show such intention, or it may be deduced from the wording of the will itself, as where there was a gift to trustees on trust to pay a legacy of 1,000*l.* to A., and upon "further" trust to pay A. 1,000*l.* But if the legacies are not equal, the legatee is entitled to both. If the legacies are given by two different instruments, *e.g.*, one by a will, and another by a codicil, to the same person, he will take both, whether the amounts of the legacies are equal or not, unless it appear that the gift by the latter instrument is meant to be substitutional. Thus, if the testator in the codicil were to recite that he has not time to alter his will, the legacies given by it would be substitutional. And gifts by different instruments, if they are of the same amount, and are expressed to be given from the same motive, or for the same purpose, are substitutional, not cumulative. (*Benyon* v. *Benyon.*)

Sometimes substitutional.

The case is otherwise if the gifts are not of the same amount, and even where they are equal in amount they will be cumulative if they be given to a person, describing him, but only so far that the description is a mere description, and not a ground for giving the legacy. Thus, a legacy is given by will of 100*l.* to a "servant," and another legacy of the same amount to the same person, describing him again as "my servant": both will take effect. (See *Wilson* v. *O'Leary.*)

Gifts when Vested and when Contingent.

Rules as to limitation of contingent legacies:

There will be but few cases in which your client will not desire to make a gift or devise or bequest to take effect on the happening of some future event. In such a case, he may

wish either to give the beneficiary a present interest in the subject-matter of the gift, but to postpone the enjoyment or possession of it to a future time, or he may wish to postpone the taking of any interest at all therein until the future time. In other words, he may wish to vest the gift at once with a postponement of the payment thereof, or he may wish to postpone the actual vesting of the gift itself. In order to give effect to his wishes it will be necessary for you to understand the rules which regulate the question whether a legacy payable at a future time is vested or contingent. Where there is an express direction as to the period of vesting, nothing will vest before the appointed time. Where there is no such express direction, the courts will favour the construction which will result in an early vesting.

(i) Devise of land when vested;

We will, in the first place, consider the rules relating to real estate. A devise to A. and his heirs, "if" or "when" he attains twenty-one, is contingent, and he takes no interest till he attains twenty-one. But there are exceptions to this rule, and such a devise will be vested under certain circumstances. Firstly, this will be the case when there is created an estate, prior to A.'s, to some third person either for A.'s benefit or for that of some other person, to endure during the minority of A. (*Boraston's Case.*) Thus, where A. devised lands to his wife *till* his son B. should attain twenty-one, and *when* B. attained twenty-one *then* to B. and his heirs, it was held that the devise was a vested one, and vested in B. upon A.'s death. (*Manfield* v. *Dugard.*) Secondly, in a devise to A. for life, and from and after his decease to B., if or so soon as he shall have attained the age of twenty-one, B. gets a vested interest. (*Andrew* v. *Andrew.*) Thirdly, if there is a gift over on death under twenty-one, this fact will show that the devisee is to take whatever the person claiming under the devise over is not entitled to, *i. e.*, the immediate interest, and the devise will be vested; but under a devise of such property to those of a class who attain twenty-one, the devise is contingent, and even though preceded by a life estate; so that if none of the class have attained twenty-one at the death of the tenant for life, the devise over, if any, will take effect. (*Edwards* v. *Hammond;* and see *Festing* v. *Allen.*) And, fourthly, if there is a gift to

A. for life, if she shall so long remain unmarried, or for life until bankruptcy, followed by a gift over on marriage or bankruptcy, the remainder is vested, and takes effect *either* on the marriage or bankruptcy, *or* upon A.'s death, and is not merely contingent upon marriage or bankruptcy. Where there was a gift to a wife for life, or during widowhood, with gifts over on her death, it was held that the gifts over did not take effect on the wife's re-marriage, but only on her death. (*Jeffrey* v. *Tredwell; Luxford* v. *Cheek;* and see *Underhill* v. *Roden;* and *Sartoris* v. *Sartoris.*)

(ii) Of money charged on land is usually contingent.

In cases not of a devise of land, but of money charged on land, the rule is, that if the legacy is given at twenty-one, or payable at twenty-one, and the person does not attain twenty-one, the legacy is not raisable. (*Parker* v. *Hodgson; Pawlett* v. *Pawlett.*) But if the payment is postponed not from circumstances personal to the legatee, but for the convenience of the estate, as where there is a preceding life estate, the legacy will vest before the time for payment arrives (see *Evans* v. *Scott*); and if the legatee dies during the continuance of the life estate, his representatives will nevertheless be entitled to the legacy.

(iii) Of purely personal property depends on limitation.

As to legacies of personal estate not charged on land. If there is an express direction as to the period of vesting, the legatee will take no interest till then, unless the meaning of the word "vesting" may be considered to be equivalent to "payable." Thus, where there is a gift to A. to be vested in him or to be paid to him when he attains twenty-one, A. will take an immediate interest. And where there is a direction to pay legacies at the death of the tenant for life, a subsequent direction as to the vesting at twenty-one will not make the legacies contingent, "vesting" here being considered merely to point out the time at which possession is to be given to the legatee. (*Barnett* v. *Barnett.*)

Rules as to time of vesting.

If there is no direction as to the time of vesting, the following seem to be the rules:—When there is a clear gift, with an additional direction that it is to be paid when the legatee attains a given age, the interest will be vested, the payment only being postponed. But if the gift is to A. when he shall attain a certain age, and there is nothing to show that the time of pay-

ment is not an essential condition to the vesting of the gift, the legacy will be contingent. (See *Stapilton* v. *Cheales*; and *Hanson* v. *Graham*.) But even where a legacy would on the wording of it be contingent, it may be construed as vested, if such seems to have been the testator's intention. Thus, if a legacy is given to A. when he attains a certain age, and there is at the same time a gift of the interest to A. in the meantime, or a direction to apply such interest or any part thereof for his maintenance, or if the legacy is directed to be immediately separated from the rest of the estate, the legacy will vest at once. (See *Hanson* v. *Graham*.) This rule will also apply to a gift to a class of persons, except where the legacy is charged on land, or where the gift is to a class, and the attaining of twenty-one is a part of the description of the class, as where it is to "such of my children who attain twenty-one." But it would apply if the members of the class were designated *nominatim*. And a mere discretionary power to trustees to apply the whole or any part of the income for maintenance is not within the rule. (*Leake* v. *Robinson*; *Re Grimshaw*.) And where a fund is given to a class of persons at a given age, with a direction to trustees to apply the income thereof for the maintenance of the members of the class generally, not confining the direction to the shares of each particular member, this will not create a vested interest in a member of the class who dies under the given age. (*Re Parker*.) When, however, the event on which the legacy is to be paid is one which may not happen, however long the legatee live, as where it is marriage, &c., the legacy will be contingent. Thus, a gift to A. to be paid on marriage is a gift upon a condition, and is contingent (*Atkins* v. *Hiscocks*; and see *Taylor* v. *Lambert*), unless interest is given in the meantime. (*Booth* v. *Booth*.)

Legacy for a particular purpose.

When a legacy is given for a particular purpose, the fact that the purpose cannot be effected will not prevent the legacy from vesting in the donee. Thus, a legacy given to A. to apprentice him is an absolute gift to A.; and if he dies before being apprenticed, the legacy belongs to his personal representatives.

The great complexity of the rules relating to the solution of the question, Is a legacy vested or contingent? prevents us from giving you any fuller exposition of them than we have attempted

above, and for more information about them we refer you to the leading cases of *Stapilton* v. *Cheales*, and *Hanson* v. *Graham*, and the notes thereto in Tudor's Leading Cases.

Legacies upon Condition.

The next point with regard to legacies which we will draw your attention to, as being deserving of your notice, is the giving of legacies upon conditions.

When a precedent condition, the court favours the donee.

When a subsequent condition, the court disfavours the donee.

If the condition is a precedent one, *i. e.*, is a condition which is to exist or be performed before the property given is to vest, the court will favour the donee, and will hold the gift vested upon a substantial compliance therewith; but if it is a subsequent condition, *i.e.*, one upon which an estate or interest given is to divest, the court will construe it strictly, because it tends to defeat a previous gift.

When the condition precedent is impossible, &c.

If a condition precedent is impossible, impolitic, or otherwise illegal, the result will be different, according as the property is realty or personalty. In the case of real property given on a condition precedent, the property will not vest in the donee unless the condition be performed (see *Caldwell* v. *Cresswell*), so that if the condition cannot be performed or is illegal, the gift will not take effect; but, in the case of personalty, the gift will take effect, notwithstanding the condition, except in the case where a condition involves no physical impossibility (*Robinson* v. *Wheelwright*); or where the fulfilment of the condition was the sole motive of the gift; or where the impossibility was not known to the testator when he imposed the condition; or where, the condition, being originally possible, has subsequently become impossible by the act of God. In these cases the gift will not take effect. But, both as regards realty and personalty, when a condition precedent which, without the performance of the condition, becomes impossible by the act of the testator, the gift will take effect. (*Gath* v. *Barton*.) If the condition is void as being a *malum in se*, the whole gift is void; whereas if it is merely a *malum quia prohibitum*, the gift will be absolute.

A condition inconsistent with or repugnant to the estate or interest given is void; such would be the case with a condition annexed to an absolute devise or bequest that, if the donee

attempted to alienate, the property should go over to someone else. (See *Bradley* v. *Peixoto*.)

When the condition subsequent is impossible, &c.

As to conditions subsequent, if the condition is impossible or illegal, the gift will remain to the donee, unless there is a gift over, and even then it will not be divested if the condition has become impossible. But if the condition is good, and is not performed, it will work a forfeiture, even where the legatee is unaware of the existence of the condition. (*Re Hodges; Astley* v. *Earl of Essex*.) This will be the case as to realty, whether there is a gift over or not, and also as to personalty, subject to this qualification, that there are some conditions (*e. g.*, conditions in partial restraint of marriage) which will be held *in terrorem* only, and void unless there be a gift over.

Conditions in restraint of marriage.

The conditions which testators are most in the habit of imposing are conditions in restraint of marriage; conditions restraining alienation, or restricting the full enjoyment of the property given; and conditions involving forfeiture of a gift by a legatee if he should dispute the will.

Summary of law as to conditions in restraint of marriage.

As to conditions in restraint of marriage, you should consult the leading case of *Scott* v. *Tyler*. The following is a summary of the rules laid down in various cases:—

(A) *Where the Property given is Land or a Charge thereon.*

(a) A limitation till marriage, and then over, is good, and the gift goes over on marriage. (See *Jones* v. *Jones*.)

Condition in general restraint of marriage.

(b) A condition in general restraint of marriage, whether precedent or subsequent, is bad, as opposed to public policy, unless annexed to a gift to a widow or widower. (See *Allen* v. *Jackson*.)

Marriage with consent.

(c) Where land is given subject to a condition precedent of marriage with the consent of some third person, the consent must be procured before the gift can vest, and whether there is a gift over on marriage without such consent or not. But if the consent is arbitrarily withheld by the third person, the condition will be satisfied by marriage without his consent.

Condition subsequent on marriage without consent.

(d) If a gift is subject to be divested by a condition subsequent on marriage without consent, a breach of the condition will divest the estate, unless the condition becomes impossible to be performed.

(B) *As to Personalty.*

The above rules (a) and (b) as to real property apply also to personal property.

(c) A condition precedent, requiring marriage with consent, is satisfied by marriage without consent, except where (1) there is a distinct gift over; (2) the condition is directed against marriage under a certain reasonable age; (3) the legatee takes another legacy on the breach of the condition. (See *Re Brown.*)

(d) A condition subsequent directed against marriage without consent is considered *in terrorem*, and the donee will retain the gift though he marries without consent, except in cases just mentioned in sub-clause (c).

(C) *As to Realty and Personalty.*

A condition imposing a partial restraint on marriage only is good; *e. g.*, a gift to A., on condition that he does not marry B., or does not marry before a reasonable age, or a native of any particular country, or a domestic servant (*Jenner* v. *Turner*), or a person of a particular religion, as a Papist (*Duggan* v. *Kelly*), or a Christian. (*Hodgson* v. *Halford.*) But a condition which, though in partial, will probably result in total, restraint of marriage, will be void; as where the condition is that the legatee shall not marry a person who has not freehold property of the annual value of 8,000*l.* per annum. (*Kelly* v. *Monk.*)

Conditions in restraint of alienation:

(i) Not to sell, &c.

A general condition in restraint of alienation is bad; but a limited one, *e. g.*, a condition not to sell except to certain persons, is good. (*Re Macleay.*) But a condition not to sell except to one person is bad. (*Attwater* v. *Attwater.*) And so is a condition by which the devisee in fee is compelled, before selling or leasing the property, to offer it to some person or persons named at a given sum or at a stated rent. (See *Re Rosher*, *Rosher* v. *Rosher.*) If the restriction is directed to the restraining the sale of property for a limited time, not offending the perpetuity rule, it is good if there is a gift over. (*Renaud* v. *Tourangeau.*)

(ii) Of annuities.

Conditions of this nature are frequently made use of where annuities are given by will. For (although the gift of an annuity with a direction to set apart a fund to secure it will

not entitle the annuitant to have it valued and the value paid him: *Wright* v. *Callender*) when money is directed to be laid out in an annuity this vests the capital necessary to produce it in the annuitant, and he has the right to call for it, and a mere statement that he is not to do so is of no effect. (*Stokes* v. *Cheek*.) Again, if there is a direction to purchase a government annuity of a given amount, the annuitant is entitled to the purchase-money though he die before the time when the annuity was to be purchased. (*Dawson* v. *Hearn*.) Nor will a restraint on anticipation deprive the annuitant of the right to the purchase-money, except in the case of a married woman. *Woodmeston* v. *Walker*.) And again, where money is given to purchase a government annuity for A. for his life, and there is a direction that A. is not to have the value of the annuity, and that if he sells it the annuity shall cease and form part of the testator's residuary estate, A. can, nevertheless, sell the annuity and make a good title to a purchaser. In *Pitman* v. *Holborrow*, where there was a direction to the trustees of a will to purchase government annuities out of the proceeds of land when sold, and one annuitant died before and the other after the completion of the sale, it was held that the estate of the annuitant who died before completion of the sale had no claim on the value of the annuity, but that the other estate could claim. (And see *Hunt-Foulston* v. *Furber*.) The only way to exclude the annuitant from any claim to the price of the annuity in lieu of the annuity itself is to limit it with a gift over upon alienation or anticipation.

(iii) Of life interests.

Similarly, life interests in property cannot be given subject to restraint upon alienation, except in the case of a gift to the separate use of a woman. If a testator wishes to confer an inalienable life interest on a donee, he must limit it to him with a proviso by way of conditional limitation for cesser on his attempting to alienate it, in which case the interest will cease even though there be no gift over. Thus, the interest may be given until alienation or bankruptcy, or it may be limited to the donee for life, but conditioned to determine on his attempting to alien it, or on his bankruptcy. A testator may often wish that the interest given to a donee may on his becoming bankrupt be applied for the benefit of the family. In framing a gift to carry out his intentions in this

(iv) On bankruptcy.

respect, you will have to bear in mind that the strongest expression by a testator of his wish that the donee shall have the personal and exclusive enjoyment of the property will not prevent it devolving on his trustee in bankruptcy. (*Brandon* v. *Robinson*.) Nor can an estate in lands or the entire interest in personalty, as distinguished from the ownership of the income thereof, be made liable to divestment, even on alienation or bankruptcy, and no gift can be made to a person with a continuing interest therein after his bankruptcy. The only mode in which the testator's intention can be effected is to give the property to trustees with a discretionary power either to give or withhold it as they think proper. But more than this, you should take care that the discretion given is limited, so that it may not be exercised in favour of the donee himself; for when a life interest is given over on bankruptcy for the maintenance of the bankrupt and his family, the trustee in bankruptcy will be entitled to one-half that income (*Rippon* v. *Norton*); and if the trustees have a discretion to appoint what amount shall be applied to the maintenance of the bankrupt and his family, an inquiry will be directed as to how much ought to be applied for each, and what would have been taken by the bankrupt will pass to his trustee. (*Kearsley* v. *Woodcock*.) And even where the trustees have the power to apply the income for the benefit of the bankrupt or his family, if they do appoint any to the bankrupt it goes to his trustee in bankruptcy. (*Holmes* v. *Penney*.)

Mode to prevent life interest passing to trustee on bankruptcy.

In connection with these kinds of restriction, note that when property is given over on alienation by the donee, this means only voluntary alienation, not hostile bankruptcy as a rule (*Lear* v. *Leggett*; *Pym* v. *Lockyer*; *Graham* v. *Lee*); but it was held to include liquidation under the Bankruptcy Act, 1869; and, where there was a very strong intention of personal benefit to the legatee, it was held to include even bankruptcy. (*Cooper* v. *Wyatt*.) And when property is given over on bankruptcy, this will include a bankruptcy taking place after the date of the will and subsisting at the testator's death, and even one the proceedings in which commenced before the date of the will and which is subsisting at the testator's death. (*Trappes* v. *Meredith*; *Metcalfe* v. *Metcalfe*.) But if the bankruptcy is annulled before

Alienation means hostile as well as voluntary alienation.

the period of vesting, the forfeiture does not take place. (*Samuel* v. *Samuel.*)

A condition not to dispute the will is valid, and will be effectual to divest the property from the donee; but in the case of personalty it must be accompanied by a gift over on non-compliance with the condition. But the effect of such a condition will not be to make an invalid gift good; and a condition not to institute legal proceedings as to the estate and effects devised is too general, and is bad. (*Rhodes* v. *Muswell.*) (v) Not to dispute will.

Legacies to Creditors, Debtors, and Others.

Another point which you must consider is the consequences which will follow the giving of a legacy to a creditor or a debtor of the testator. The gift of a legacy to a creditor, equal to or greater than the amount of the debt, will be deemed to be given in satisfaction of the debt; but if it is less in amount, then it is not a satisfaction, even *pro tanto*. Nor, again, will there be satisfaction when the legacy consists of a residuary bequest, or of something absolutely different: thus, the gift of an estate will not satisfy a pecuniary debt. And even though the legacy be equal to, or greater in amount than, the debt, it will not operate to satisfy it where it is expressly payable at a more distant time, or on a contingency, or for a specified and different purpose, or if the mode of payment directed makes the legacy less beneficial than the debt. Further, the presumption that satisfaction is intended will be rebutted if there is a direction in the will that debts and legacies shall be paid (*Chancey's case;* and see *Ex parte Pye*); or merely that the debts shall be paid. (*Bradshaw* v. *Huish.*) (i) Gifts to creditors;

A legacy to a debtor of the testator will not release him from the necessity of paying his debt, unless evidence is forthcoming to show that the testator intended it to have this effect. (See *Eden* v. *Smyth.*) Therefore, if the testator's wish is to release the debtor, he should expressly state that he forgives or releases it. (ii) Gifts to debtors;

Formerly great care had to be taken, in giving a legacy to a charity, to so word the gift that the legacy came out of the property formerly available for charitable legacies; that is, the (iii) Gifts to charities.

testator's pure personalty. This was owing to the provisions of the Mortmain Acts, which prohibited anything savouring of lands being given by will to a charitable use, and to the rule that equity would not marshal assets for the benefit of a charity. (*Williams* v. *Kershaw*.) But now, owing to the Mortmain Act, 1891, the provisions of which we have already discussed (see *ante*, p. 15), no special care in framing charitable legacies is required.

Provisions for the Benefit of the Testator's Family.

Duty of solicitor.

After devising or bequeathing specific and general legacies, the will is next concerned with provisions for the benefit of the testator's family. These vary so greatly with the state of the testator's family and his wishes concerning them, that it is quite impossible to give you any sketch of the various schemes which may be adopted. Your duty as a solicitor is not to control the testator's wishes, but merely to put them into clear and unmistakeable language, the meaning of which cannot be open to misconstruction, and to take care that he does not, in his disposition of his property, infringe any of the precepts of the law. In taking your instructions from him, you must accurately ascertain the condition of his family and of his affairs generally, and his wishes with regard to the manner in which his property is to be divided among those he desires to benefit. In most cases a will is made soon after marriage, when the testator has a wife and the children are young, and in this case the property will most often be given to trustees to be converted into money, with a power to them to postpone such conversion, and a direction given out of the proceeds to pay the testator's debts and funeral and testamentary expenses, and to invest the residue (with power to vary the investments), and to pay the income to the wife for her life (or perhaps only during widowhood), and after her death to stand possessed of the trust funds for such of the testator's issue as she shall appoint, and in default of such appointment for such of the issue as attain twenty-one, or being a daughter marries under twenty-one. Then follow the trusts in default of any child attaining a vested interest, and pointing out the ultimate destination of the property. The

Usual provisions.

case *Oppenheim* v. *Schweder* is worthy your attention. There it was held that, where a legacy was given by a testator to his wife to be paid within three months of his death (the testator evidently intending to make an immediate provision for his wife), the legacy to the wife had no priority over the other legacies, and she was not entitled to be paid in full upon a deficiency of assets; and see *Greenwood* v. *Greenwood*, where it was held that a legacy given to the widow of the testator, and expressed to be in lieu of dower, the widow was not entitled to be paid in priority to the other legatees.

(i) Provisions for the testator's children: As to advancements;

Some care will be necessary in framing the provisions for the benefit of the testator's children. First, it must be remembered that advancements may have been or may be made to them by the testator during his lifetime, and care should be taken not to leave it doubtful whether or not such advancements are to be deducted out of their shares in such cases.

As to advancement of children.

Testators usually treat their children as a class. We shall hereafter mention the rules which are applicable for the determining at what period the members of a class are to be ascertained, and we have already discussed the question, At what period do contingent gifts become vested? And, as we have seen, the trustees have power, under the Conveyancing Act, 1881, to apply the income of the shares of children towards their maintenance, but the power is not applicable in many cases, and the insertion of the usual maintenance clause is often still necessary. (See *ante*, pp. 404, 405.) But in the absence of express provision, the trustees have no power to apply any part of the trust fund itself towards the advancement in the world of the children, without the sanction of the court, so that if it be so intended an express power to this effect must be given to them. Such a power generally authorizes the trustees to apply, in or towards the advancement in the world of the children, any part not exceeding one-half of the principal of their respective shares, and for that purpose to raise, by mortgage or otherwise, such sum as they may think fit.

Provision to prevent lapses: (i) Of gifts to children;

Provision should be made to meet the case of the children dying during the life of the testator (or the life of the widow, if the vesting of the shares is postponed till after her death) and leaving issue. In the latter case there will be of course a lapse,

but in the former the 33rd section of the Wills Act will, in some cases, prevent a lapse. But this section does not apply to a gift to a class; so that where there was a bequest to the testator's children living at his decease, and one child died during his lifetime leaving issue, it was held that his representatives took nothing, but that the other children alone were entitled (*Fulford* v. *Fulford; Olney* v. *Balis*); and this is so even though there is but one child. (*Harvey* v. *Gillow.*) Care, then, should be taken to prevent cases of this sort occurring, by the insertion of a clause that if any of the testator's children who attain twenty-one, or marry under that age, should die in the testator's lifetime leaving a child who may survive the testator, then the fund which the parent would have taken had he lived to acquire a vested interest shall be held by the trustees for such children. Again, you must note that the 33rd section of the Wills Act does not apply to special powers of appointment, though it does apply to general powers of appointment. Thus, if the testator has a power to appoint a sum to each of his children by will, and he exercises this power—even though he exercises in favour of his children by name—and one of his children dies in his lifetime leaving issue, the sum appointed will nevertheless lapse; for the Wills Act uses the words "devise and bequeath," and not the word "appoint." (*Holyland* v. *Lewin.*) Against this, then, you must also provide, when the power extends not merely to children, but to issue (see *Alexander* v. *Alexander*), by a clause giving the issue of such children who die in the testator's lifetime the share their parent would have taken under the appointment had he or she survived the testator.

(ii) Of appointments to children;

(iii) Gifts over on death;

When a will contains words providing against the death of devisees or legatees, a question often arises whether they refer to the death of the devisee or legatee in the lifetime of the testator, or to death at any, and what, subsequent period. The rules on this point are laid down in the case of *Edwards* v. *Edwards*, and are as follows:—(1) Where there is a gift to A., and if he shall die to B., the contingency on which B. is to take is the death of A. in the lifetime of the testator. (2) Where there is a gift to A., and if he shall die *without children* to B., the contingency has reference to the death of A. at any time. (3) Where there

is a gift to Z. for life, with remainder to A., and if he shall die to B., the contingency has reference to the death of A. during the life of Z., the tenant for life. (4) Where there is a gift to Z. for life, with remainder to A., and if he shall die without children to B., B. will take upon A.'s death at any time. (*O'Mahony* v. *Burdett.*)

But sometimes words referring to death will not be construed as referring to death in the testator's lifetime, and will apply exclusively to death after his decease. Thus, when a testator bequeaths property to A. for life, and after his decease to his children, and provides that if any of the legatees die before their legacies become payable, then the legacy of each so dying shall go to his executors and administrators, these words will mean dying in the interval between the death of the testator and the death of A., and will not be considered as disposing of the legacies failing by lapse incurred by a legatee predeceasing the testator. (See *Corbyn* v. *French.*)

(iv) Provisions as to lapse. Illustrative cases.

Provisions intended to prevent a lapse when there is a gift to a class also require great care in their treatment. Thus, where a testator bequeathed a sum of money owing to him by A. to the younger children of A., to remain in A.'s hands till the children were capable of receiving it, the legacy or share of any of them dying before such time to go to the survivor or survivors of them, it was held that this must be construed "if the legatee should have survived the testator," so that where a legatee died in the lifetime of the testator, as nothing could vest in the legatee so neither could it survive from him. (*Rider* v. *Wager.*) There are many conflicting cases on this subject; the rule seems to be that where there is a gift as a class to children living at the testator's death, with a direction that if any should die in his lifetime his issue should be substituted for him, and take his "legacy," all the children living at the date of the will must be taken into account, whether they die in the testator's lifetime or not; and the issue only of parents who were alive at the date of the will will take. The word "legacy" shows that the testator meant to substitute only issue of parents who, at the date of the will, were capable of taking. (*Christopherson* v. *Naylor.*) But if there is a gift to children living at a definite time, and a distinct gift to issue of children dying before that time, with a proviso that the issue shall only take the parent's share, then,

though no children dead at the date of the will would take a share, the issue of such children would, *there being a distinct gift to them*. It is important to bear in mind the distinction between a mere substitution of issue for the parent, and a distinct gift to the issue in event of the parent dying: for a substitutional gift will take effect though the original donee dies before the testator, whereas, in the latter case, if the donee dies in the lifetime of the testator, the whole gift will fail. (See *Re Roberts*, *Tarleton* v. *Bruton*.) Thus, where there is a gift to a class of parents, with a substitutional gift to the children of parents dying before the period of distribution, the children of a parent who dies after (but not before) the date of the will, and before the testator, will take. (See *Re Hotchkiss*.) Again, where gifts to children make provision for letting in the issue of children dying before a specified period, questions have arisen whether the issue will take if they do not outlive the prescribed period of distribution. It has been held that they will take, though they do not outlive such period. The contingency attaching to the gifts to the parents does not attach to the gift to their issue, and they accordingly take vested interests; *e.g.*, if there is a bequest to A. for life, then "to such of my nephews as may then be living and the children of such as may then be dead," the children take vested interests on their parents' deaths, whether they survive A. or not (*Martin* v. *Holgate*), and whether they take by original gift to them or by substitution for their parents. (*Re Merrick*.) But under a mere substitution of issue for a parent, the children only who survive the parent will take, for substitution cannot occur till the death of the parents, and if the parties who were to be substituted are not then existing, it is clear they cannot be substituted. (*Humfrey* v. *Humfrey*).

Distinction between substitution of issue, and distinct gift to issue.

Death of children before attaining given age.

In limiting gifts over in case a legatee dies before his legacy is payable, the following rules should be attended to by you:—

Rules as to the effect of limitation of gifts over.

(1) Such a gift over will take effect if the legatee dies in the testator's lifetime, though after the period fixed for payment (*Re Gaitskell*), or if he dies after the testator but before such period. (*Rammel* v. *Gillow*.) If no time is fixed for the payment, the period of payment will be referred to the date of the testator's death. (*Ibid.*)

(2) If there is a gift to A. for life, and after his death to B.

and C., and a gift over in event of the death of either before their respective legacies become payable (no time being appointed for division or payment), the gift over will take effect as to the share of either of the two who dies before the tenant for life, A. (*Crowder* v. *Stone*.)

(3) If there is a gift to A. for life, followed by a gift to his children at twenty-one, with a gift over on death before the legacy is payable, the gift over will take effect, as regards the shares of legatees who die in the testator's lifetime, even though over twenty-one (*Walker* v. *Main*); and if the gift is to A. for life, and then the property is vested in his children to be divided at twenty-one, with a gift over if any die before his share is payable, here "payable" will mean "attaining twenty-one," and the issue of children will take who die in the lifetime of A., but over twenty-one. (*Halifax* v. *Wilson*.) But where there is a gift to A. for life, and then to her children, to be transferred to them at twenty-one, and if any die before his share is payable, leaving issue, to such issue, and if any die before his share is payable without issue, then over, here the gift over will be good on the death of a legatee during the life of the tenant for life, though he may have attained twenty-one; for the word "payable" in its ordinary sense would mean payable at the death of A., and there is no reason for altering the ordinary meaning, since the issue of those dying before their shares are payable are provided for under the terms of the gift. (*Re Willmott*.)

In provisions for issue, perpetuity rule must observed.

In providing for the issue of unborn persons, you must have the perpetuity rule before your mind. We have already referred to this rule. (*Ante*, p. 436.) We will here merely draw your attention to one or two points which have been decided under it. A gift, the result of which is to postpone the vesting of property for more than twenty-one years after the testator's death, is void, though he does not avail himself of the permitted period of a life or lives in being as well. If the vesting of a grandchild's share is postponed to the death of the survivor of its parents, the gift will be too remote, for a child of the testator may marry a person born after the testator's death, and that parent may be the survivor. (*Hodgson* v. *Ball*.) Where one part of an entire gift does not, but the other does,

infringe the rule, the whole gift fails. Thus it will be void in the case of a gift to the children of A. and the grandchildren of B., a living person. (*Leake* v. *Robinson.*) But if the testator expressly cuts the gift into two parts, and gives one to the children of A., and the other to the grandchildren of B., the whole gift will not then fail, but only the gift to the grandchildren of B. (*Re Moseley.*)

In accumulating income, Thellusson Act must be observed.

In carrying out instructions to direct the accumulation of income, you must take care that you confine such accumulations to one of the periods allowed by the Thellusson Act (39 & 40 Geo. 3, c. 98); or if the object of accumulation is that lands may be purchased, to the period allowed by the Accumulations Act, 1892 (55 & 56 Vict. c. 58); but a direction to accumulate income which exceeds the authorized period is not altogether void, but only void as to the excess. (See *Griffiths* v. *Vere.*) But an accumulation which, prior to the Thellusson Act, exceeded the limit allowed by the perpetuity rule, was held not to be set up by that act so as to be valid for the period of twenty-one years. (See *Boughton* v. *James.*) Accumulation can only be directed for *one* of the periods named in the act (*Wilson* v. *Wilson*), and the act applies where there is no direction to accumulate, but where there is in the will an executory gift or devise of such a nature that accumulation becomes necessary during the suspense of vesting. (See *Macdonald* v. *Brice.*) The act does not apply to accumulations of income for the purpose of paying debts, raising portions, or repairing buildings (*Mason* v. *Mason*), though it apparently does apply to accumulations for the purpose of improving the estate. (*Vine* v. *Raleigh.*) The act does not apply where the income to be accumulated is derived from the sale of timber.

Duties of Executor with regard to Wasting Property.

The Howe and Dartmouth rule;

When personal estate or the residue of personal estate is given to any person for life with a remainder over, it will be the duty of the executors to convert into money any part thereof which consists of property of a wasting or perishable nature. (See *Howe* v. *Dartmouth.*) But it may appear that the intention of the testator was, that the tenant for life should enjoy the pro-

is not applied if contrary intention expressed.

perty *in specie*, and in such case there will not arise the necessity of converting. Such an intention will be argued if, for instance, there is a direction (when the property consists of leaseholds) to renew them, and keep houses thereon in repair, or a trust to sell the property on the death of the tenant for life, or on a given event, or not to sell without the direction of all parties, or to retain any portion of the estate in the same state in which it shall be at the testator's decease. (*Grey* v. *Siggers*; and see *Re Chancellor*, *Chancellor* v. *Brown*.) And there is no necessity to convert the property when it is given *specifically*.

Howe and Dartmouth rule applies to executors.

Again, a similar duty to convert will fall on the executors when there is a gift of the residue of the estate to several persons in succession. The burden of proof is in every case upon the person who says the rule in *Howe* v. *Dartmouth* should not be applied. (*Macdonald* v. *Irvine*.) The insertion of a mere power or discretionary trust to retain the property in its present state does not amount to an indication that the tenant for life is to enjoy *in specie*. (See *Porter* v. *Baddley*; *Grey* v. *Siggers*.)

Liability of trustees if they neglect rule. Illustration.

By neglecting to convert, the trustees will incur a liability for any loss which may occur. Thus, if by the terms of the will the trustees were authorized to invest in real as well as government securities, they will be liable for the amount which would have been produced by a conversion at the end of a year from the testator's death, with interest thereon at 4 per cent. If they were bound to invest in the 3 per cents. only, they will be liable for the amount which would have been produced by a conversion and investment at the end of that first year, with interest at 3 per cent. from that time. But should any gain arise, the beneficiaries will be entitled to it, and as between the tenant for life and the remainderman, the former will receive such interest as he would have received if the conversion and investment had been made at the end of the first year, and the excess of the income will be added to the corpus, and with such corpus go to the remaindermen.

Further duties as to residue.

When residuary property is directed to be sold, and the produce laid out in government or real securities for the benefit of A. for life, and after his death to others, and no direction is given as to the accumulation of the profits accruing before conversion, the income which arises from such part of the residue

as, at the time of the testator's death, was invested in securities of the same nature as those which are directed to be invested in, will go to A. from the time of the testator's decease. (*Brown* v. *Gellatly.*) But as to such part thereof as is not then invested upon securities of the same nature as those directed, the income thereof during the first year from the testator's death will not go to A., but he will only be entitled to so much income as the property would have produced if invested according to the will, and the excess income will be added to the corpus of the residue. (*Holgate* v. *Jennings*; *Dimes* v. *Scott.*) The tenant for life of a residue is not entitled to the income of such part of the testator's estate as is applied in payment of legacies, during the period which intervenes between the testator's death and the time when such legacies are actually paid; such income forms part of the corpus of the residue. (*Holgate* v. *Jennings.*) To prevent any questions arising as to the destination of the income prior to the conversion, you should, in every case, authorize the executors to postpone the sale and conversion as may seem fit to them, and direct that the rents and profits should, from the time of the testator's death, go to the same person and in the same manner as the income of the proceeds of the conversion would have done if the conversion had been made.

Copyholds should not be included in a trust for sale and conversion.

In connection with the devise upon trust for sale and conversion, you should not include copyholds, for this would involve the admittance of the trustees whenever they wished to sell, and the consequent liability to pay fines and fees due thereon. It is the practice to give them a mere power to appoint the copyholds, and when an appointment is made by them to a purchaser, he is considered as coming in under the will, and the necessity of the trustees being admitted is obviated. (*Holder* v. *Preston.*) But this plan can only be adopted when it is intended to sell at an early date; for the lord of the manor can, if this is not done, seize the land *quousque*, and compel the legal admittance of the person entitled to the legal ownership.

The testator's family having been provided for, provision may be made to meet the event of there not being any issue to take. Sometimes the property is given to the testator's brothers and sisters and the children living at the testator's death, or such of them as have died during his lifetime, equally *per stirpes.*

What Property will be included in a General Devise.

Such devise will include freeholds, leaseholds, and copyholds.

By sect. 26 of the Wills Act a general devise of lands will include not only freehold, but leasehold and copyhold land, unless a contrary intention appear. Under this section it has been held, that where there is a gift of all the personalty to A. and all the lands to B., the leaseholds, though strictly speaking personalty, will pass to B. (*Wilson* v. *Eden.*) Had the word "freehold" been prefixed to the general devise of the lands, however, this would not have been the case. (*Stone* v. *Greening.*) Again, where a testator charged an annuity on his real estate, but he had no land, except some leaseholds for long terms, it was held that the leaseholds were charged. (*Sully* v. *Davis.*) And leaseholds will pass under the description of the testator's real estate in a particular place. (*Morse* v. *White.*)

If, however, there is a devise of the testator's "real estate" (as distinct from a devise of "lands") to A., and of his "personal estate" to B., leaseholds would pass to B., and not to A. (See *Turner* v. *Turner; Wilson* v. *Eden.*)

A general devise formerly passed trust and mortgage estates;

Trust and mortgaged estates used to pass under a general devise in the absence of a contrary intention. (*Braybrooke* v. *Inskip.*) But now, by sect. 30 of the Conveyancing Act, such estates, unless they are of copyhold tenure, when sect. 30 does not apply (Copyhold Act, 1887, sect. 45), do not pass either under a general or specific devise; but notwithstanding any such devise such estates vest in the personal representatives of the deceased mortgagee or trustee.

and still comprises property appointable under general power;

Again, by sect. 27 of the Wills Act, a general devise of the real estate, or a general bequest of the personal estate, will pass real estate or personal estate over which the testator has a general power of appointment, *i.e.*, power to appoint in whatever manner he may think proper, unless a contrary intention appear by the will. (*In re Clarke's Estate.*) To show a contrary intention, there must be something in the will inconsistent with the view that the general devise or bequest was meant as an execution of the power. (*Scriven* v. *Sandon.*) It has been recently held that where a general power to appoint property is given, and the instrument giving the power requires the instrument executing it to refer to the instrument creating the power, the property will

not be deemed to be appointed by general devise or bequest. (*Phillips* v. *Cayley*, and see *Davies* v. *Davies*.) A will speaks from the death of the testator, as we have seen, so that no contrary intention can be deduced from the fact that the will was executed before the testator received the general power to appoint. (*Stillman* v. *Weedon*; *Boyes* v. *Cook*.) But other circumstances will be taken into consideration. Thus, where the testator subsequently to his will made a settlement by which he gave to himself a power to appoint certain property, it was held that a residuary bequest in his will did not operate to execute that power, a contrary intention being deduced from the fact of his reserving the power to appoint subsequently to the execution of his will. (*Re Reading's Settlement*, see also *Thomas* v. *McKenzie*.)

but not under special power.

The section does not apply to special powers, which must consequently be referred to in the will (see *Hope* v. *Hope*), and a general gift will not include property over which the testator had a special power of appointment, even though he had no property of his own at the time he made the will (see *Re Mills*), and though the general gift is in favour of the person in whose favour the power was exerciseable (*Fowkes* v. *Williams*; *Bailey* v. *Lloyd*); but if there is any indication in the will that the gift is made in pursuance of some power, and the gift is in favour of the objects of the power, the gift may operate as an appointment under the power. (*Re Leake's Trusts*; *Pidgely* v. *Pidgely*.) We may note incidentally that the effect of exercising a general power of appointment by will is to make the property appointed assets for the payment of the testator's debts, whether the appointor be a man (*Fleming* v. *Buchanan*) or a married woman. (*Re Harvey*; *Hodges* v. *Hodges*; *Roper* v. *Doncaster*; Married Women's Property Act, 1882, s. 4.)

The Effect of a Devise without Words of Limitation.

Such a devise will pass all the testator's interest.

By sect. 28 of the Wills Act, such a devise will pass the fee simple, or other the whole estate or interest which the testator has power to dispose of by will, unless a contrary intention appear in the will. This only applies to estates previously existing, and not to those created by the will itself, so that if a testator creates an annuity by his will and bequeaths it to A.,

A. will only get an annuity for his life. (*Nicholls* v. *Hawkes.*) A devise of rents and profits will, under this section, pass the fee simply in the land out of which they arise. (*Mannox* v. *Greener.*)

The Meaning of the Words "Die without Issue."

"Die without issue," present meaning of.

By sect. 29 of the Wills Act, the expression "die without issue," "die without leaving issue," or "have no issue," or other words importing either want or failure of issue of any person in his lifetime or at his death, or an indefinite failure of issue, shall be construed to mean want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of issue unless a contrary intention appear by the will, by reason of such person having a prior estate tail, or of a preceding gift being (without any implication arising from such words) a limitation of an estate tail to such person or otherwise. But the section is not to extend to cases where such words import that if no issue described in a preceding gift shall be born, or if there shall be no such issue which shall live to attain the age or otherwise answer the description required for obtaining a vested interest by a preceding gift to such issue.

Former meaning of.

Before the act a gift of realty and personalty to A., and if he should die without issue to B. in fee, would give to A. an estate in tail in the real estate, and an absolute interest in the personal estate; for the words "die without issue" were construed to mean an indefinite failure of issue, and, therefore, the gift over to B. was void as offending the perpetuity rule as far as the personalty was concerned; and as to the realty, as A. could at once bar the estate tail, and acquire the fee simple, B. ran the risk of being totally defeated, even though A. were to have no issue. If, however, the limitation of *personalty* were to A., and if he died without *leaving* issue, to B., the courts held that in such a case the personalty would go to B., if A. died leaving no issue. (*Forth* v. *Chapman.*) By virtue of the above section, A. will now take a fee simple in the real, and an absolute interest in the personal estate; but this estate and interest will be liable to be defeated by his dying without leaving issue living at his death, and, if this occurs, B. will become entitled as executory

devisee and legatee. A. having no power to defeat the gift to him.

Conveyancing Act, 1882, on subject.

The provision in the Wills Act as to *lands* must now, however, be read subject to sect. 10 of the Conveyancing Act, 1882, under which the gift to B. becomes void directly any of A.'s issue attains twenty-one.

When Wills Act does not apply.

The section in the Wills Act has been held not to apply to a case where property was devised to A., with a limitation over "if he should die without issue or under twenty-one." Here "or" was read "and," and A. obtained the fee upon his attaining twenty-one. (*Morris* v. *Morris.*) Again, where there is a gift to A. and the heirs of his body, and if he should die without issue to B., here A. will take an estate tail, which he may bar, and thus defeat B. (*Green* v. *Green; Dawson* v. *Small.*) In a case where A. devised freeholds to trustees on trust to pay the rent to B. for life, and after B.'s decease, "she leaving no children," to C., it was held that B. only took a life estate, and there was no implied gift to the children which B. subsequently had, but that the property fell into the residue (*Re Rawlins*); for the implication was not necessary. (*Gardner* v. *Sheldon.*)

The Amount of the Estate which Trustees will take under various Circumstances.

Usually the trustee takes the fee simple.

Sect. 31 of the Wills Act provides that, if real estate be devised to trustees without an express limitation of the estate to be taken by them, and the beneficial interest in the estate, or surplus rents and profits thereof, is or are not given to any person for life, or if such interest is given to some person for life, but the purposes of the trust may continue beyond the life of such person, such devise will vest the fee in the trustees, and not a mere estate determinable when the purposes of the trust have been satisfied.

The old doctrine was, that if there were no words of limitation the trustees took no greater estate than was sufficient for the purposes of the trust, and this doctrine resulted in much confusion, as it was impossible to say what amount of estate the trustees took in any particular instance.

When a Lapse of a Devise or Bequest occurs.

When a lapse occurs.

The general rule as to lapse is, that when a gift is made by will, and the object of that gift dies in the lifetime of the testator, the gift fails. By sects. 32 and 33 of the Wills Act, two exceptions are created to this rule. First, there will be no lapse where a person to whom an estate tail or quasi-entail has been devised dies in the lifetime of the testator leaving issue, if such issue be living at the death of the testator, but the devise will take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will. Secondly, the same result will follow, if a child or other issue of the testator to whom property is devised or bequeathed dies in the lifetime of the testator, leaving issue who survive the testator.

Exceptions created by the Wills Act:

(i) Sect. 32, as gifts of estates tail;

(ii) Sect. 33, as gifts to issue.

Effect of sect. 33.

(a) Leaving issue, a condition only;

The result of the peculiar wording of the section as to gifts to issue is, that the devisee or legatee may make a will disposing of the property given to him, and such will will be operative, though he die before the testator, provided he die leaving issue. (See *Johnson* v. *Johnson*.) It is not necessary that the issue of the donee, who was alive at the death of the testator, should be the same issue who is alive when the donee died. If any of his issue is alive at the testator's death no lapse will take place. Thus, where a legacy was given to A., a daughter, who died before the testator, leaving a daughter B., who also died before the testator, leaving a daughter C., who survived the testator, it was held that the legacy did not lapse. (*Re Parker*.) The section does not apply to gifts to a class; so that if there is a bequest to the children of the testator living at his decease, and one of those children predeceases the testator, leaving issue, the issue of such child will take nothing; but the other children alone will be entitled (*Fulford* v. *Fulford*), and this is so, even though there be but one child only. (*Harvey* v. *Gillow*.) Nor does the section apply to cases where the testator is exercising a special power of appointment. So that if A. has a power to appoint a sum of money to each of his children, and he exercises the power in favour of a child, and that child dies in A.'s lifetime leaving issue, the appointed gift will lapse, notwithstanding this section. (*Holyland* v. *Lewin*.) But the section does apply

(b) As to gifts to issue as a class;

(c) As to gifts to children under powers.

when a general power of appointment is exercised in favour of a particular child (*i.e.*, a child referred to by name). So that if such child dies before the testator, leaving issue living at the testator's death, the gift does not lapse, but takes effect as if the appointee had died immediately after the testator. (See *Eccles* v. *Cheyne*.)

For some curious results arising under this section reference may be made to *In re Jones*, *Jones* v. *Hensler*, and *Eagar* v. *Furnival*.

Some illustrations.

In the former case, A. devised a freehold house to his son B., and left the residue of his realty to C. and D. B. made his will, giving all his property to his father. B.'s will contained no residuary gift. B. died in A.'s lifetime leaving issue who survived A. And it was held, that as under the Wills Act it had to be presumed that the father's death occurred before the son's, the son's gift to the father lapsed, and that therefore E., the heir-at-law of B., was entitled to the property.

In the latter case (*Eagar* v. *Furnival*), property was devised by A. to his daughter B. B. died in A.'s lifetime leaving issue living at A.'s death, and it was held, that as under the Wills Act it must be presumed that B. had died immediately after A., she was sufficiently seised of the lands to give her husband the right to an estate by the curtesy in them.

Appointment of Guardians.

Under 12 Car. 2, c. 24.

The testator may appoint a guardian to his infant children by virtue of 12 Car. 2, c. 24. But the power given by this act did not extend so as to enable the *mother* to appoint a guardian.

Under the Guardianship of Infants Act, 1886.

But now by the Guardianship of Infants Act, 1886, it is provided that, on the death of the father, and if the father died before the 25th June, 1886, then from that date the mother, if surviving, is to be the guardian of her infant children either alone, when no guardian has been appointed by the father, or jointly with any guardian appointed by the father. If the father has not appointed a guardian, or if the guardian is dead or refuses to act, the court may appoint a guardian to act jointly with the mother. The mother may, by deed or will, appoint a guardian to act after the death of herself and her

husband if the infant be then unmarried; and where guardians are appointed by both parents they must act jointly. And the mother may by deed or will provisionally nominate a person to act as guardian jointly with her husband; and the court can, after her death, if it be shown that the father is unfitted to act as sole guardian, confirm the appointment of the mother, or make such order as seems fit. (See *In re G.*, an infant.) If the guardians cannot agree on some question affecting the welfare of the infant, either of them may apply to the court, which can make any order that may be proper. Powers are given to the court as to granting the custody of the children to the mother, with leave of access by the father, and to remove a testamentary guardian and substitute another in his place. A testamentary guardian under 12 Car. 2, c. 24, can be authorized to appoint a new guardian to act when he dies. (*Re Parnell.*) But the act does not enable a testator to appoint a guardian to any but legitimate children, nor to children married at their father's death. If two persons are appointed guardians, the guardianship survives. (*Eyre* v. *Shaftesbury.*)

Undisposed-of Residue.

As to undisposed-of residue.

In conclusion, you should note that any interest undisposed of by the will, if realty, will pass to the heir, and, if personalty, to the next of kin; and a direction that a certain person is to take no share in the estate of the testator, or disinheriting the heir, will not prevent him from taking as next of kin or heir. Formerly it was thought that the heir-at-law was, or next of kin were, entitled to any part of the residue which the testator directed should, on the happening of some event (*e.g.*, on the death of a person entitled for life to such part), "form part of and fall into his residuary estate" (*Humble* v. *Shore*); but it has been recently laid down, in *Palmer* v. *Answorth*, that there is no rule on the subject, and that whether such part goes to the heir or next of kin, or falls into the residue for the benefit of the residuary donees, is a matter of intention, to be determined according to the circumstances of each case, and, generally speaking, will be held to belong to the residuary donees, and not to the heir or next of kin. If realty is devised to a trustee on trusts which fail, and there is no

Trustee's position.

heir, the trustee formerly took beneficially, but now the equitable interest would escheat under the Intestates' Estates Act, 1884; but in the case of chattels real or other personalty, the crown, and not the trustees, has always been, and is still, entitled if there be no next of kin. Unless the will shows a contrary intention, the executor, as distinguished from a trustee, will, under 1 Will. 4, c. 40, hold the undisposed-of residue for the benefit of the next of kin, but if there are no next of kin he will be entitled to it in his own right. (*Roose* v. *Chalk*. See *Attorney-General* v. *Divers*, where the executor would have been entitled to the undisposed-of residue had not his wife attested the will and so prevented him taking any benefit in the testator's estate, owing to sect. 15 of the Wills Act, 1837.) But he will only take such part of the residue as the testator did not attempt to dispose of, so that he will not be entitled to legacies which have lapsed, nor will he take beneficially if he be expressly appointed to carry out the trusts of the will, and be treated as undertaking a duty and not receiving a benefit, or if the testator shows an intention to dispose of the residue, though he has not actually done so. (*Mence* v. *Mence*.)

Executor's position.

By way of conclusion, and as a useful suggestion in connection with the subject of legacies, we draw your attention to the following letter, &c., addressed by the Law Society to its members:—

LEGACY AND SUCCESSION DUTY.

DEAR SIR, *January* 16, 1889.

The attention of members is directed to the effect of the provisions of the 21st section of the 51 Vict. c. 8, the Customs and Inland Revenue Act, 1888.

Under that section it is considered by the authorities, and apparently correctly so, that in the case of a will in the very common form which directs the conversion of the testator's residuary real and personal estate and the payment out of the proceeds of debts, funeral expenses and legacies, the duty on legacies must be apportioned. That the values of the real and personal estate must be separately ascertained, and succession duty be paid upon such part of the legacy as is proportionate to the value of the real estate, and legacy duty on such part as is proportionate to the value of the personal estate.

The authorities, with the view of minimising the inconvenience and expense which this enactment will cause, have prepared one form to comprise both duties.

At the same time the inconvenience must necessarily be great, whilst the expense incurred in ascertaining the relative values of the real and personal property and preparing the account is wholly disproportionate to

any benefit to be derived by the Revenue from the enactment. Moreover, if the estimates of such values prove incorrect, much trouble may subsequently arise. It is suggested, therefore, that until some alteration be made in the enactment, if it be possible to obtain such alteration, it will be desirable that in preparing wills framed in the manner above mentioned or under which there is any probability of a blended fund being applied in payment of legacies, a clause to the effect of the clause suggested at the end of this circular should be inserted. It may also be desirable that in the case of wills already executed a short codicil to the same effect should be made when opportunity occurs.

I am, dear sir, yours faithfully,
E. W. Williamson, *Secretary*.

Proposed Clause.

All legacies given by this my will or by any codicil hereto [and the legacy duty thereon] shall be paid primarily and in priority to my funeral and testamentary expenses and debts out of my personal estate in exoneration of the proceeds of sale of my real estate, and I direct that such personal estate and proceeds of sale shall be marshalled to give effect to this provision of my will.

The words in brackets should be used when the legacies are given free from duty.

III. The Execution of a Will.

The will being drafted, should be read over to the testator, and his approval thereto obtained,—and if the matter is urgent the draft should be executed as a will. The will will then be engrossed, and great care should be taken that the engrossment contains no errors. The next step is to obtain the testator's execution to the document.

On this subject we would first remind you that a will of lands must be executed according to the *lex loci*, that is, according to the law of the country where the land lies; but a will executed according to English law will pass lands in Scotland. (31 & 32 Vict. c. 101.) A will of personal property must be executed by the *lex domicilii*, that is, according to the law of the country where the testator was domiciled; but to facilitate the proof of wills of *British subjects* (see hereon *Bloxam* v. *Favre*), by 24 & 25 Vict. c. 114, every will made *out* of the United Kingdom by such a person, whatever his domicile at the time of executing it, or at the time of his death, shall, as regards personalty here, be well executed if made according to the forms required by the law of (1) the place where made, or (2) of the place where he is domiciled when it is made, or (3) of his domicile of origin.

Wills made by British subjects abroad.

And as to wills made *in* the United Kingdom by a British subject, the same result is to follow, if the will is executed according to the forms required by the law in force in that part of the United Kingdom where the same is made. Thus, if a testator's original domicile is in England, and he is domiciled in France, but goes to Switzerland on a visit, and there makes his will, he may execute it according to the law of Switzerland, or of France, or of England. And he may execute it according to the English or French law, if he be domiciled in England, and goes to France on a visit, and there makes his will. Again, if domiciled in England, and when on a visit to Scotland he made his will, it would be valid if executed according to the English or the Scotch law.

Formalities for the execution of a will.

In ordinary cases, however, the will about the execution of which you are concerned will be the will of a person domiciled here and relating to property here, and must be executed as required by sect. 9 of the Wills Act, 1837 (7 Will. 4 & 1 Vict. c. 26), as read with 15 Vict. c. 24, that is to say—(a) The will must be in writing. (b) The testator must sign it, or someone must sign it for him in his presence and by his direction. (c) The signature must be made or acknowledged by him in the presence of two witnesses. (d) The signature must be at the foot or end of the will. (e) The witnesses must sign in the presence of the testator; but no form of attestation is necessary, nor need the witnesses sign in the presence of each other. (*Re Allen.*)

Testator's signature.

The testator must sign the will, or someone must sign for him in his presence and by his direction. The signature must be made before those of the witnesses; for it is necessary to a valid attestation that the witnesses should see the testator's signature. (*Re Olding; Shaw* v. *Nicholl.*) If the signature is made by some third person, it must be made in the presence of the testator, and this will not be considered to have been done unless the testator is shown to have seen the signature made, or at least to have been in such a position that, had he looked, he could have seen it.

Position thereof.

The signature must be at the foot or end of the will. The meaning of the expression "foot or end" has been explained by a subsequent statute (15 Vict. c. 24), which provides that a

signature shall be deemed to be so placed if it is placed at or after, or following, under or beside or opposite to the end of the will, so long as it is apparent that the testator intended to give effect by the signature to the writing signed as his will. No will will be affected by the circumstance that the signature does not follow immediately after the foot of the will, or by the circumstance that a blank space intervenes between the concluding word of the will and the signature, or that the signature is placed among the words of the testimonium clause, or clause of attestation, either with or without a blank space intervening, or follows or is after or under or beside the names of the witnesses, or by the circumstance that the signature is on a side or page or other portion of the paper or papers containing the will, whereon no clause of the will is written above the signature. But no signature is to be operative to give effect to any disposition or direction which is underneath or which follows it, nor to any disposition or direction inserted after the signature is made.

Attestation of signature.

The signature of the testator must be made or acknowledged by him in the presence of two witnesses present at the same time. Both the witnesses must be present together when the will is signed, or when the signature is acknowledged, and they must both *sign* after the testator has so signed or acknowledged. (*Wyatt* v. *Berry*; *Re Mansfield*.) And, further, they must both sign in the presence of the testator, though they need not sign in the presence of each other. (*Re Allen*. But see *Casement* v. *Fulton*.) The fact that a witness (or the husband or wife of a witness, takes an interest under the will which he attests will not make the attestation invalid, but the witness will forfeit his gift. (Wills Act, 1837, s. 15. See hereon the recent cases of *Re Divers*, *Att.-Gen.* v. *Gregory* (*ante*, p. 534), and *In the goods of Smith*.)

It is not necessary that the testator should actually see the witnesses sign, but he must have been in such a position that he could have seen them if he had wished. (*Casern* v. *Dade*.)

Acknowledgment of signature.

Instead of making his signature in the presence of the witnesses, it is open to the testator to make it beforehand, and then to call in witnesses and acknowledge the signature before them. The acknowledgment need not be made in express words; it is sufficient if made by gesture (*Re Davies*), or by a simple request

to the witnesses to place their signatures underneath that of the testator. (See *Gaze* v. *Gaze*, and *Re Warden*.)

No form of attestation required.

No special form of attestation is required; but it is advisable to append a full form of attestation, as follows: "Signed and acknowledged by the said A. B., of, &c., as his last will, in the presence of us, present at the same time, who, at his request, and in his presence, and in the presence of each other, have subscribed our names as attesting witnesses." If the attestation be in this form, probate of the will will be granted without any special affidavit from the attesting witnesses.

For further details as to the execution of wills, and as to the law relating to the revocation, alterations in wills, and the revival of revoked wills, we must refer our readers to their companion volume dealing with the law and practice in probate matters. (See Part I. of the Student's Probate, Divorce, and Admiralty.)

Pt. VII.—SOME MISCELLANEOUS SUBJECTS.

We propose to consider under this heading—

I. Partnership Deeds.
II. Releases.
III. Disclaimers.
IV. Disentailing Assurances.
V. Appointments under Powers.

I. Partnership Deeds.

Generally all persons may be partners.

Owing to the provisions of the Partnership Act, 1890, which you will find set out at length, *post*, p. 546, partnership articles and agreements are not now so necessary as they formerly were; and, indeed, it will perhaps in many cases be sufficient to rely wholly on the statute, or at least to confine the articles or agreement to varying its provisions in points in which the parties desire to alter their statutory relations, rights, and liabilities as partners, as between themselves and as regards the outside public. Your clients, however, may desire to have the terms of their partnership put down in "black and white," and comprehensively contained in a private document instead of regulated by a public act of parliament. In this case you may be called upon to draft a partnership agreement. In drawing it you must remember that an infant may be a partner, but the contract will not be binding on him, and he may avoid it on coming of age, if he takes steps to do so within a reasonable time. A married woman may now be a partner, and so may an alien, the subject of a friendly state.

Preliminary remark.

If articles are to be drafted they should, in the first instance, clearly state the nature and scope of the proposed business, for, as before mentioned, the power of one partner to bind his co-partners extends to all the engagements he enters into within the ordinary scope of the business; so that, if this is left doubtful, vague and unlimited powers will be placed in the hands of one member of the firm. If no time for the commencement of the partnership is named, it will be deemed to have commenced as from the date of the articles.

(i) Length of term;

A time should be fixed for the termination of the partnership. It is not advisable to have a very long term, because it may happen that circumstances may arise which, while they do not in law afford a ground for dissolution, nevertheless make it desirable that the parties should discontinue to carry on business in co-partnership; and again, it is not desirable to have too short a time, as it will not allow sufficient time for the partners to settle down to work in harmony. The term of either seven or ten years is generally adopted in practice, though of course the length of the term is a matter in which the parties must suit themselves, and which will depend to a large extent on the nature of the proposed business. The effect of fixing a definite term during which the partnership is to last is, that it prevents any one partner exercising the right, which he would otherwise have, of determining the term at will. (*Peacock* v. *Peacock*.)

(ii) Retirement of one partner;

If thought necessary, an express right to retire may be given to each partner. In this case it will be the function of the articles to declare upon what terms he shall exercise that right. It is sometimes stipulated that he shall not have the right to retire before a certain time, and that he shall give a specified length of notice before doing so, and that the other partners shall in such case have the right to purchase his share under certain limitations. Provision will also be made for the fixing of the value of the retiring partner's share, and it may be stipulated that it is to be valued with reference to the last annual stock-taking, or that it shall be ascertained by a valuation, and it should declare whether or not the value of the good-will is to be taken into account in determining how much the retiring partner is entitled to. And where it is thought desirable, clauses should be inserted prohibiting the retiring partner from

carrying on a business similar to that carried on by the firm within a certain radius, and that if he starts business outside that radius he will not solicit custom from the firm's customers. (*Pearson* v. *Pearson; Vernon* v. *Hallam; Davies* v. *Davies.*) This point does not seem to have been dealt with in the Partnership Act. It may be arranged that the retiring partner's capital shall be paid out to him in a lump sum or by instalments, or that it shall remain as a loan to the firm for a certain term, and in the two last cases it should be shown what security is to be given to the owner for the payment of his capital.

(iii) Determination of the partnership by notice;

Sometimes, too, a power may be given to any member of the partnership to determine it by a notice, if it appears, upon any taking of accounts, that after the payment to each partner of interest on the amount of his capital invested in the business, the concern has been carried on at a loss. Again, as, in the absence of agreement, there is no power to expel a partner, it may be provided that if any partner commits a wilful breach of any of the stipulations of the articles, the other partners shall have power to expel him from the firm. But provisions of this nature should be guarded by clauses that the expulsion should only take place after notice given, and that such notice should be given within a limited time after the committal of the breach, and it should be provided that if a question should arise as to whether any occasion has arisen justifying the exercise of the power to expel, such question should be settled by arbitration. It is doubtful if it is expedient to expel a partner under such a clause without giving the offending member an opportunity of explaining his conduct (see *Blisset* v. *Daniel; Stewart* v. *Gladstone*), unless it is so framed as to enable an expulsion to be made without assigning any reasons at all therefor. (See *Russel* v. *Russel.*)

(iv) Special provisions necessary when an old business is taken over.

Partnership articles may be required either on the occasion of two or more persons entering into a partnership to carry on a new or original business, or of the taking over of an old or established business by new persons, or by a new person or persons, in conjunction with the old partners or some of them. In the former case there will, of course, be no existing debts; but in the latter there may, and probably will, be debts and liabilities outstanding on the part of the old firm. The law as

Doctrine of novation.

to the position of the incoming partners, with reference to the liabilities of the old firm, is that they are not answerable for any of the debts of the old firm contracted before the period of their admission, and no agreement with regard to such debts entered into by them with the old firm will amount to *novation* or substitution of liability so as to give the creditors the right to look to them for payment, nor will any undertaking have such effect unless it be one made with the creditors themselves. The new firm must have assumed the liability to pay the debt, and the creditor must have agreed to accept the new firm as his debtor, and to discharge the old firm from its liability. (*Rolfe* v. *Flower*.) Thus, where the creditors of the old firm know that the new firm has arranged to assume the debts of the old firm, and go on dealing and receive payment of part of the debts out of the blended assets of the old and new firms, such creditors thereby discharge the old firm, and accept the new firm as their debtor. (*Bank of Australia* v. *Flower*.) But mere knowledge by the creditor of the dissolution of partnership will not release the old partners from their liability to him, though he continues his old account with the new firm, unless he appears expressly or by some act to have accepted the substituted credit of the new partnership. (*Kirwan* v. *Kirwan*.) The arrangements made between the old and the new firm may be that the stock in trade, and generally all the assets of the old firm, shall be transferred to the new firm subject to the liabilities. The latter will be estimated and their amount deducted from the estimated value of the assets, and the amount so arrived at will be treated in the partnership articles as the capital brought in by the members of the old firm. Another plan sometimes adopted is to wind up the old firm altogether, and the old partners will contribute their capital to the new firm, just as if they were persons entering into an original partnership. As it may be some time before the affairs of the old firm can be wound up, and the amounts due to the members thereof ascertained, they may, instead of paying their capital down at once, covenant in the articles to bring in specified amounts on fixed dates so as to allow time for the realization. The articles generally state what the capital is to consist of, and provide that it shall be employed in the business. It is also provided, in cases

where the partners do not contribute the capital in equal shares, and it is not intended that they should share the profits equally, that each partner shall receive interest at a fixed rate on the share of capital brought in by him, and that any advances made to the firm by him, with the consent of the firm, beyond the amount agreed to be brought in by him, shall be considered to be a debt due from the firm to him, and shall bear interest. In the absence of provision to the contrary, partners will not be entitled to interest on capital, unless it has been the usual course of dealing among them to allow interest. (*Cooke* v. *Benbow.*)

(v) Provision as to sharing of profits;

In the absence of stipulation, the partners are entitled to share profits equally, though their shares in the capital may be unequal, so that where it is intended that they shall take shares therein proportionate to the amount of their respective shares in the capital, this should be expressly provided for.

(vi) Provisions as to expenses;

Provisions are then made for the bearing of expenses and of losses incurred in carrying on the business, and it is generally provided that they shall be borne in the first instance by the earnings of the business, and if these are insufficient, then by the partners rateably in proportion to their respective shares in the profits. To provide for the immediate and personal expenses of the partners, each member is generally allowed to draw out of the partnership cash on account of his share of profits for the current year, and the amount which each shall be at liberty to draw is specified. It is provided, also, that if the sums drawn out from time to time by any partner in any one year exceed his share of the profits for that year, the excess shall be refunded by him.

(vii) Provision as to books of account;

Provisions are then made that proper books of account shall be kept, and all transactions entered therein.

(viii) Status and powers of each partner;

Then follow clauses determining the personal status of each partner, and regulating his powers. In the absence of any such provision each partner has the right to take part in the management of the business. Sometimes all the partners are required to devote their time and attention to the business; sometimes one or more of them is exempted from attending to it, or is required to devote his labours to one or more particular branch or branches of it, and the members generally are often precluded from carrying on any other business. Each partner is required

to be faithful to his fellows in all transactions, and to furnish correct accounts and statements of all such transactions; not to employ the effects of the firm, except in the business, nor to do anything whereby the same or his interest in the same may be taken in execution for private debts, nor to become bail for any person, nor to discharge any servant of the firm without the consent of the partners, except for flagrant misconduct; not to lend money nor deliver on credit any goods of the firm to any person whom the other partners shall by notice in writing have forbidden him to trust, nor to release or compound any debt owing to the firm, except with the consent in writing of the other partners.

(ix) The taking of accounts;

Then come the stipulations as to the taking of yearly accounts. These generally provide that an account shall be taken on the 31st of December of every year, for the year ending upon that date, of the stock in trade, credits, property, and effects, debts and liabilities of the firm, that the account shall be entered in as many books as there are partners, and that each book shall be signed by each partner, and one copy retained by him, and that he shall be then bound by that account. But provision is made for the reopening of the account if any manifest error is found therein within a limited time after the signature. In spite of such a provision, however, a partner will not be bound by an account which he has been induced to sign by fraud or misrepresentation, and he can always have it reopened on these grounds by application to the Chancery Division.

On the termination of the partnership term by the effluxion of time, it is usual to provide that the assets shall be realized, and the proceeds applied first in the discharge of the liabilities of the firm, and then in payment to each partner of the capital brought in by him with interest, and then the surplus is to be divided among the partners rateably in proportion to their shares in the profits.

(x) Provision as to death of one partner;

The provisions to meet the event of the death of a partner (which operates at law to dissolve the partnership), are generally very similar to those made to meet the case of the retirement of a partner. Provisions are made for the taking over of his share by the survivors, either at a valuation or according to the value

as set forth in the last balance-sheet signed before his death (see hereon *Hunter* v. *Dowling*), and for the payment out to his representatives of his capital in a lump sum, or by instalments, or that it shall remain as a loan to the firm for a fixed time, and also as to the manner in which the value of the share in the profits is to be ascertained. Note that, in the absence of any stipulation, upon a dissolution, each partner has the right to require that the whole partnership assets shall be realized by sale; but this right will not be allowed to be exercised if it would unduly injure the other parties interested; and that the right to wind up the affairs of the firm is personal to the members, and cannot be exercised by the executors of a deceased partner, or the trustee in bankruptcy of a bankrupt partner.

(xi) Power for majority of partners to act;

Further, it is frequently provided that all questions as to the conduct and management of affairs, including the employment and dismissal of servants, and the giving of credit, and the compounding of debts, shall be determined by a majority of the partners.

(xii) Arbitration clause.

The articles generally conclude with a clause providing that all differences arising among the partners, as to the construction of the articles, or as to any division, act, or thing to be made or done in pursuance of its terms, or as to any other matter relating to the partnership, shall be referred to arbitrators, one to be appointed by each of the partners in difference, or to an umpire chosen by the arbitrators before entering on the consideration of the matters referred to them. It may be advisable to declare that such arbitration shall be subject to the provisions of the Arbitration Act, 1889. (As to the effect of this clause, see *Pini* v. *Roncoroni*.)

Articles of partnership must bear a 10*s.* stamp if by deed, and a 6*d.* agreement stamp if under hand only. But if a premium is paid by one partner, then an *ad valorem* stamp duty must be impressed. This duty is at the rate of 5*s.* for every 50*l.* of the money paid, and where one partner retires and transfers his interest in the partnership assets, &c., to the others, the deed must bear the like duty of 5*s.* for every 50*l.* of the money paid by the continuing partners. (See sect. 57 of the Stamp Act, 1891, and *Troup* v. *The Commissioners of Inland Revenue;* see also *Foster* v. *The same*.) But stamp duty may be apparently

avoided in this case by the retiring partner, instead of assigning his interest, merely giving a receipt for the money he receives from the firm, and acknowledging that he has no further claim on his co-partners. (See Lindley on Partnership.)

We now proceed to set out the main provisions of the Partnership Act, 1890.

The Partnership Act, 1890.

Definition of a partnership.

A partnership is defined by statute as the relation which subsists between persons carrying on a business with a view to profit. (53 & 54 Vict. c. 39, s. 1.) No writing is necessary to constitute the relationship of partners, unless the objects for which the persons have associated are of such a nature that they cannot be effected within a year, when the contract must be in writing under the fourth section of the Statute of Frauds. And a firm may not consist of more than ten members when the business is a banking one, nor of more than twenty in the case of any other business, unless it is registered under the Companies Act, 1862, or is formed under the provisions of some other act of parliament, or by virtue of letters patent, or charter from the crown, or is a mining company subject to the jurisdiction of the stannaries. In determining whether a partnership does or does not exist, regard must be had to the following rules :—

Rules to determine the question of partnership.

(1) Joint tenancy, tenancy in common, joint property, common property, or part ownership, does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof.

(2) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which or from the use of which the returns are derived.

(3) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(a) The receipt by a person of a debt or other liquidated

amount by instalments or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such:

(b) A contract for the remuneration of a servant or agent of a person engaged in a business by a share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such:

(c) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such:

(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such: Provided that the contract is in writing, and signed by or on behalf of all the parties thereto. (See hereon *Ex parte Baxter, Re Vance.*)

(e) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business is not by reason only of such receipt a partner in the business or liable as such. (Sect. 2.)

In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in para. (d) of the foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors

of the borrower or buyer for valuable consideration in money or money's worth have been satisfied. (Sect. 3. See *In re Hildesheim*.)

Power of a partner to bind the firm.

As to the relations of partners to persons dealing with them, the statute provides that every partner is an agent of the firm and his other partners for the purpose of the business of the partnership, and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner. An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners: but this does not affect any general rule of law relating to the execution of deeds or negotiable instruments. This reservation keeps alive the rule that one partner cannot without express authority, except for the purpose of a release, bind the firm by deed, nor, except in mercantile firms, by a negotiable instrument. It has also been a rule (see *Stead* v. *Salt*) that a partner cannot bind the firm by submitting matters to arbitration, nor by a guarantee (*Brettel* v. *Williams*), and this is so still. (Sects. 5, 6, 46.)

Liabilities of members of the firm.

Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorized by the other partners; but this section does not affect any personal liability incurred by an individual partner. (Sect. 7.)

If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement. (Sect. 8.)

Liability of firm is joint and not several.

Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a

partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject to the prior payment of his separate debts. (Sect. 9.)

Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act. (Sect. 10.)

Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it, and where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm, the firm is liable to make good the loss. (Sect. 11.)

Joint and several liability.

Every partner is liable jointly with his co-partners and also severally for everything for which the firm, while he is a partner therein, becomes liable under either of the two last preceding sections. (Sect. 12.)

The statute does not affect the decision in *Cleather* v. *Twisden*, where one member of a legal firm received some foreign bonds for a client in order that he might collect the dividend coupons, and he misapplied the money, and it was held that his co-partner was not liable for the loss.

Holding out.

Everyone who, by words spoken or written or by conduct, represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to anyone who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made; but where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name, or of the deceased partner's name as part thereof, shall not of itself make his executors or administrators or his estate or effects liable for any partnership debts contracted after his death. (Sect. 14.)

Admissions by a partner.

An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm. (Sect. 15.) This would not apparently extend to a representation made by one partner as to the extent of his own authority to bind the firm. (*Ex parte Agace.*)

Notice to a partner.

Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner. (Sect. 16.)

Liability of outgoing and incoming partner.

A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner: a partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement: but a retiring partner may be discharged from any existing liabilities, by an arrangement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted. (Sect. 17.)

The doctrine of "novation."

Such a contract is known as a "novation." A retiring partner's liability for debts contracted after he ceases to be a member is not dealt with in the section, and therefore is governed by the old law, namely, he is not liable therefor, provided he gave the usual notice that he has ceased to be a member of the firm. But an incoming partner is still liable for *new* debts arising out of a continuing contract made by the firm before he joined it.

Guarantees to or by a firm.

A continuing guaranty given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given. (Sect. 18.)

Relationship of partners *inter se.*

As to the relations of partners to one another the statute provides that the mutual rights and duties of partners, whether ascertained by agreement or defined by the act, may be varied by the consent of all the partners, and such consent may be either express or inferred from a course of dealing. (Sect. 19.)

All property, and rights and interests in property, originally brought into the partnership stock or acquired, whether by purchase or otherwise, on account of the firm, or for the purposes and in the course of the partnership business, are partnership property, and must be held and applied by the partners exclusively for the purposes of the partnership and in accordance with the partnership agreement. But the legal estate or interest in any land which belongs to the partnership shall devolve according to the nature and tenure thereof, and the general rules of law thereto applicable, but in trust, so far as necessary, for the persons beneficially interested in the land under this section.

Where co-owners of an estate or interest in any land not being itself partnership property, are partners as to profits made by the use of that land or estate, and purchase other land or estate out of the profits to be used in like manner, the land or estate so purchased belongs to them, in the absence of an agreement to the contrary, not as partners, but as co-owners for the same respective estates and interests as are held by them in the land or estate first mentioned at the date of the purchase. (Sect. 20.)

Unless the contrary intention appears, property bought with money belonging to the firm is deemed to have been bought on account of the firm. (Sect. 21.)

Where land has become partnership property, it shall, unless the contrary intention appears (see *Wilson* v. *Holloway*), be treated as between the partners (including the representatives of a deceased partner), and also as between the heirs of a deceased partner and his executors or administrators, as personal and not real estate. (Sect. 22.)

The interests of partners in the partnership property and their rights and duties in relation to the partnership are determined, subject to any agreement express or implied between the partners, by the following rules:

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses whether of capital or otherwise sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(a) In the ordinary and proper conduct of the business of the firm; or

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at the rate of five per cent. per annum from the date of the payment or advance.

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner shall be entitled to remuneration for acting in the partnership business.

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners.

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them.

No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners. (Sect. 24.)

A partner wrongly expelled cannot sue for damages, but can only claim to be reinstated in his rights as partner. (*Wood* v. *Wood*; *Blisset* v. *Daniel*.)

As to the determination of the partnership by notice.

Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners. Where the partnership has originally been constituted by deed, a notice in writing, signed by the partner giving it, shall be sufficient for this purpose. (Sect. 26.)

Where a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will; and a continuance of the business by the partners, or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is presumed to be a continuance of the partnership. (Sect. 27.)

Continuation of partnership after expiry of articles.

Partners are bound to render true accounts, and full information of all things affecting the partnership to any partner or his legal representatives. Further, every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connection. This rule applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner. (Sect. 28.)

As to rendering accounts, &c.

If a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business. (Sect. 30.)

An assignment by any partner of his share in the partnership, either absolute or by way of mortgage, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

As to the assignment by partners of shares in the business.

In case of a dissolution of the partnership, whether as respects all the partners or as respects the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the

other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution. (Sect. 31.)

The statute appears to allow one partner to assign his share in the partnership without the consent of his co-partners. If so, it alters the law, which hitherto has only allowed a partner to assign his interest in the *profits*. However, the assignment will practically only affect the profits, and will not give the assignee the rights of the partner whose share he has bought. Previously to this enactment it was doubtful if the assignee could call upon the partners to render an account; now he can do so; but if an account is rendered to him he must accept it. (*Kelly* v. *Hutton*.) Hitherto a partnership at will has been dissolved by one partner assigning his interest. In other cases such an assignment has been considered as a cause of dissolution, and probably the law is not altered by the act.

As to the dissolution of a firm—

The Partnership Act also contains (sects. 32—44) provisions as to the dissolution of partnership, and its consequences.

(1.) By operation of law;

Subject to any agreement between the partners, a partnership is dissolved—

(a) If entered into for a fixed term, by the expiration of that term:

(b) If entered into for a single adventure or undertaking, by the termination of that adventure or undertaking:

(c) If entered into for an undefined time, by any partner giving notice to the other or others of his intention to dissolve the partnership.

In the last-mentioned case the partnership is dissolved as from the date mentioned in the notice as the date of dissolution, or, if no date is so mentioned, as from the date of the communication of the notice. (Sect. 32.)

Subject to any agreement between the partners, every partnership is dissolved, as regards all the partners, by the death or bankruptcy of any partner, and a partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged for his separate debt. (Sect. 33.)

A partnership is in every case dissolved by the happening of any event which makes it unlawful for the business of the firm

to be carried on or for the members of the firm to carry it on in partnership. (Sect. 34.)

(2.) By order of the court.

The court may decree a dissolution of the partnership in any of the following cases:

(a) When a partner is found lunatic by inquisition, or is shown to the satisfaction of the court to be of permanently unsound mind, in either of which cases the application may be made as well on behalf of that partner by his committee or next friend or person having title to intervene as by any other partner:

(b) When a partner, other than the partner suing, becomes in any other way permanently incapable of performing his part of the partnership contract:

(c) When a partner, other than the partner suing, has been guilty of such conduct as, in the opinion of the court, regard being had to the nature of the business, is calculated to prejudicially affect the carrying on of the business:

(d) When a partner, other than the partner suing, wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable for the other partner or partners to carry on the business in partnership with him:

(e) When the business of the partnership can only be carried on at a loss:

(f) Whenever in any case circumstances have arisen which, in the opinion of the court, render it just and equitable that the partnership be dissolved. (Sect. 35.)

As to notice of dissolution.

Where a person deals with a firm after a change in its constitution, he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change. An advertisement in the London Gazette as to a firm whose principal place of business is in England or Wales shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised. The estate of a partner who dies, or who becomes bankrupt, or of a partner who, not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for

partnership debts contracted after the date of the death, bankruptcy, or retirement respectively. (Sect. 36.)

On the dissolution of a partnership or retirement of a partner, any partner may publicly notify the same, and may require the other partner or partners to concur for that purpose in all necessary or proper acts, if any, which cannot be done without his or their concurrence. (Sect. 37.)

Powers and rights of partners after dissolution.

After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. But the firm is in no case bound by the acts of a partner who has become bankrupt; this, however, does not affect the liability of any person who has after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt. (Sect. 38.)

On the dissolution of a partnership every partner is entitled, as against the other partners in the firm, and all persons claiming through them in respect of their interests as partners, to have the property of the partnership applied in payment of the debts and liabilities of the firm, and to have the surplus assets after such payment applied in payment of what may be due to the partners respectively after deducting what may be due from them as partners to the firm; and for that purpose any partner or his representatives may, on the termination of the partnership, apply to the court to wind up the business and affairs of the firm. (Sect. 39.)

As to return of premium.

Where one partner has paid a premium to another on entering into a partnership for a fixed term, and the partnership is dissolved before the expiration of that term otherwise than by the death of a partner, the court may order the repayment of the premium, or of such part thereof as it thinks just, having regard to the terms of the partnership contract and to the length of time during which the partnership has continued; unless

(a) the dissolution is, in the judgment of the court, wholly or chiefly due to the misconduct of the partner who paid the premium; or

(b) the partnership has been dissolved by an agreement con-

taining no provision for a return of any part of the premium. (Sect. 40.)

As to the rescission on the ground of fraud, &c.

Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled—

(a) to a lien on, or right of retention of, the surplus of the partnership assets, after satisfying the partnership liabilities, for any sum of money paid by him for the purchase of a share in the partnership and for any capital contributed by him, and is

(b) to stand in the place of the creditors of the firm for any payments made by him in respect of the partnership liabilities, and

(c) to be indemnified by the person guilty of the fraud or making the representation against all the debts and liabilities of the firm. (Sect. 41.)

Rights of partners when the business is continued by some of them.

Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with its capital or assets without any final settlement of accounts as between the firm and the outgoing partner or his estate, then, in the absence of any agreement to the contrary, the outgoing partner or his estate is entitled, at the option of himself or his representatives, to such share of the profits made since the dissolution as the court may find to be attributable to the use of his share of the partnership assets, or to interest at the rate of 5 per cent. per annum on the amount of his share of the partnership assets. (Sect. 42.)

Where by the partnership contract an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof he is liable to account. (*Ibid.*)

Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of

the outgoing or deceased partner's share, is a debt accruing at the date of the dissolution or death. (Sect. 43.)

Rules as to settlement of accounts after dissolution.

In settling accounts between the partners after a dissolution of partnership, the following rules shall, subject to any agreement, be observed :—

(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits:

(b) The assets of the firm (including the sums, if any, contributed by the partners to make up losses or deficiencies of capital) shall be applied in the following manner and order:

1. In paying the debts and liabilities of the firm to persons who are not partners therein:

2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:

3. In paying to each partner rateably what is due from the firm to him in respect of capital:

4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible. (Sect. 44.)

II.—Deeds of Disclaimer.

When disclaimers are used.

Deeds of disclaimer are thought of generally only in connection with trustees and executors; but they apply in many other cases as well. For the law enables a man to whom a gift of property of any kind is made to exercise the option of taking it or declining it. No one in his senses will, of course, think of declining a gift of property which is beneficial to him, but it may happen that the donee of a gift may not think it beneficial, and in such case he has the power of renouncing or refusing the gift. But he may only exercise this power *before he has accepted* the gift. Having once accepted it, and shown his acceptance of it by dealing with it in any way, he is no longer at liberty to renounce

it. The only course which is then open to him is to get rid of it by some recognized and legal form of conveyance. (See *Hurst* v. *Hurst*.) It would seem that copyholds, leaseholds and personal property may be disclaimed by parol. It is doubtful if freeholds can be so disclaimed. (See *Re Ellison's Trusts*.) It is the better course to execute a disclaimer by deed. And a disclaimer of lands by a married woman must, by 8 & 9 Vict. c. 106, be by deed acknowledged, and this appears to be so still, notwithstanding the Married Women's Property Act, 1882, since that statute makes no provision by which a married woman may *disclaim* real property as a *feme sole*. If two *distinct* legacies are bequeathed to A., and one is onerous, A. may disclaim it and take the other, but he cannot do so if both the onerous and beneficial properties are included in one gift. (See *Guthrie* v. *Walrond*.) But where a testator left a house and the furniture therein to A., and the house was mortgaged for more than its value, it was held that A. might use the furniture without having to keep down the interest on the mortgage debt. (*Syer* v. *Gladstone*.)

Whether deed is necessary.

Disclaimer of legacies.

The disclaimer which you are most likely to be called upon to prepare will be one by a trustee or an executor. You must, in such a case, remember the principle will here apply that such a person cannot disclaim after he has once done any act indicating an intention to accept the trusteeship or executorship (but see *Jago* v. *Jago*, where a trustee was allowed to disclaim, although he had joined in a receipt for money paid to his co-trustee); and for this reason there should be nothing in the deed of disclaimer in any way resembling a conveyance or release of the trust property, for that would of itself amount to an act of ownership from which an intention to accept the office might be deduced. (*Crewe* v. *Dickens*.) But it has been held that the acceptance of an executorship will not of itself prevent the executor from disclaiming real estate which has been devised to him upon trusts. (*Wellesley* v. *Withers*.) Nor can a trustee, when he has once accepted office, get rid of his duties by simply declining to act. His *cestuis que trustent* could require him to act, and he could not free himself from the burden of having to do so except by their consent, or by appointing a new trustee to act in his place. The Conveyancing Act, 1882, s. 6, provides

Disclaimers by trustees and executors.

As to dis-

claimer of power.

that a person to whom a power, whether coupled with an interest or not, is given, may by deed disclaim the power, and that after such disclaimer the power may be exercised by the other person or persons in whom the power was vested. It is doubtful, however, if a power coupled with a duty can be disclaimed even under this section. (See *Re Eyre.*) The effect of a disclaimer by one of several trustees is that the trust estate vests in the other trustees just as if the disclaiming party had never been appointed. (*Adams* v. *Taunton.*) Should the disclaimer not be executed until after the death of the survivor of the trustees who do accept, the legal estate will vest in the heir of the survivor, or, if he died after 1881, and the property is freehold, in his personal representatives. (44 & 45 Vict. c. 41, s. 30.) If all the trustees, or a sole trustee, disclaim, the result will be that the property will remain in the person who created the trust or his representatives (as trustee).

The deed of disclaimer generally recites the instrument creating the trust, and that the disclaiming party has never accepted or acted in the trusts, and then states that he thereby disclaims and renounces the office of trustee, and all interest in and power over the trust property.

A disclaimer does not seem to require any stamp duty.

III.—Deeds of Release.

Trustees not entitled to a release under seal; *secus* as to executors;

You may sometimes be called upon to draw a release by *cestuis que trustent* of their trustees, or by a residuary legatee of the executors. It seems settled that an executor, when all the testator's affairs have been wound up, is entitled to a release from the residuary legatee on handing over the residue to him; but it is not so clear that trustees, when the trusts incumbent on them have all been carried out, are entitled to be released by the *cestuis que trustent.* A trustee, on handing over the trust estate to a *cestui que trust*, is doing so in accordance with the letter of his trust, and that being so, there is no reason why he should have a claim to a release. (See *King* v. *Mullins.*) But where trust moneys have been re-settled, the trustees of the original settlement are entitled to a release under seal from

their *cestuis que trustent*, but not from the trustees of the new settlement. They must be content with a mere receipt from them. (*Re Cater's Trusts.*) The strict law, however, is not always followed in these cases, and often the *cestuis que trustent* will give their trustees a release where they are entitled to decline to do so.

when it may be set aside.

It is not advisable to act for both the parties to a release; for as a rule dealings between trustees and *cestui que trust* should be at arm's length. (See *Rhodes* v. *Bate; Turner* v. *Collings; Kempson* v. *Ashbee.*) And if a release be obtained without a full disclosure of all the circumstances it may be set aside (*Ramsden* v. *Hylton*), though until set aside it operates as a bar to all claims. (*Skillbeck* v. *Hilton.*) Accordingly full recitals should be inserted in the deed of release, setting out all the circumstances attending the administration of the trust. Recitals, further, will control the generality of the operative words, and the release will only take effect as to the matters set forth in the recitals. (See *Payler* v. *Homersham.*) If any part of the trust funds is to be retained by the trustees as not being yet payable, there should be a qualifying proviso that the release shall not extend to the funds so retained, and if anything remains to be done by the trustees, a proviso should be added deferring the operation of the release till it is done. The stamp duty on a release of this description is 10*s.*

IV.—Disentailing Assurances.

When a disentailing deed is used.

It may happen that your client is the eldest son of a large landed proprietor upon whom the property has been settled by a strict settlement. Your client will be a tenant in tail of the property, subject to the life estate of his father. He may be about to be married, and may, with the approbation of his father, be desirous of resettling the land in the strict form of settlement for the benefit of his future wife and children. Before he can do this it will be necessary, owing to the provisions of 13 Edw. 1, c. 1, if he wishes to deal freely with the estate, to execute a disentailing deed barring his estate tail in

the land and converting it into an estate in fee simple. Before you can carry your client's wishes into effect, you must turn to the Fines and Recoveries Act, study sects. 1 to 74 thereof, and acquire a knowledge of the conditions under which, as there laid down, an estate tail can be converted into a fee simple.

The Settled Land Act does not do away with disentailing deeds.

Although the Settled Land Act, 1882, gives to a tenant in tail the powers of a tenant for life under that act, and accordingly, *inter alia*, a power to dispose of the fee simple of the land, the act only applies to cases where the estate is *in possession*, and not to the cases of a tenant in tail *in remainder;* and moreover, the powers given are only to be exercised for the purposes of the act, and these purposes do not include the conversion of an estate in tail into an estate in fee simple. A disentailing deed, made in accordance with the provisions of the Fines and Recoveries Act, will still be necessary to effectuate your client's intentions, and bar his estate.

You will find by reference to sect. 18 of that act that tenants in tail restrained by act of parliament from barring their estates, and tenants in tail after possibility of issue extinct, are specially precluded from exercising the powers conferred by the act. Your client, you will notice, is not tenant in tail in possession, as his estate is preceded by the life interest of his father. Had it been in possession, he would have been at liberty to bar the entail, so as to defeat the rights thereunder not only of the issue of his body, but also of all persons whose estates were to take effect after the determination of his estate tail, without the concurrence of any other person. (See *Millbank* v. *Vane*.) In the case of an estate tail in remainder, the owner of the preceding life estate is usually the protector of the settlement, and unless he concurs in the disentailing deed, all the tenant in tail can do is to create a base fee, *i.e.*, an estate in fee simple in which the rights of his issue will be barred, but not those of persons claiming estates by way of remainder or otherwise. That is, he would acquire merely an estate of inheritance so long as he or any of his issue who would have inherited the estate tail, had it not been barred, is alive. This estate may, however, be afterwards enlarged into an estate in fee, as where the remainder in fee becomes vested in the owner of the base fee (see sect. 39); and also by the tenant in base fee subsequently obtaining the pro-

tector's consent and enrolling another deed; and also on the protector's death by enrolling another. The base fee will also be enlarged into a fee simple, when in the hands of a purchaser under a disentailing assurance, after the expiration of twelve years from the time when the tenant in base fee would have become entitled in possession; for after this lapse of time the rights of the remaindermen and reversioners are barred by the Statutes of Limitation, 3 & 4 Will. 4, c. 27, and 37 & 38 Vict. c. 57.

First tenant for life is the natural protector;

The nature of the office of protector, and the provisions as to the giving of his consent, are contained in sects. 22 to 37 of the act. As a rule, the protector is the owner of the first life estate prior to the estate tail, and subsisting under the same settlement, whether such prior estate be incumbered or disposed of or not. This means the beneficial owner, and not a mere owner in trust for others (*Re Dudson*), nor a tenant in dower, nor a bare trustee. (Sect. 27.) If the prior estate is owned under the same settlement by two or more persons, each will be sole protector as to his share (sect. 23); and where a married woman, if single, would be protector, she and her husband are together the protector, unless the estate is *settled on the woman for her separate use*, when she alone is the protector. (Sect. 24.) From the words italicised, it must be considered as doubtful whether, with regard to property which comes to a married woman for her separate use under the Married Women's Property Act, 1882, as the possessor of which she is the protector of a settlement, the husband's concurrence can be dispensed with. It has, however, been decided that a woman married since 1882 can enlarge a base fee (created by her whilst single) into a fee simple absolute without acknowledgment or the concurrence of her husband. (*Re Drummond and Davie.*) The protector is not necessarily the owner of the first preceding life estate; for by sect. 32 the settlor may, by the settlement creating the entail, appoint any number of persons, not exceeding three, to be protector, and, by means of a power to be inserted in the settlement, perpetuate the protectorship in any number of persons *in esse* whom the donee of the power shall by deed appoint protector in the place of any person dying or by deed relinquishing his office. But the number of the

but settlor may appoint not more than three persons.

persons to compose the protector must never exceed three. In these cases the office will pass to the survivors (*Belt* v. *Holtby*); and if all the protectors die, and the settlement contains no power to perpetuate the protectorship, or, there being such a power, it is not exercised, the tenant for life will thereupon become the protector. (*Clarke* v. *Chamberlain*.) If the protector be lunatic, the Lord Chancellor, or if the protector be an infant, but having no prior estate, the Chancery Division, will discharge the office; and if the settlor in the settlement declares that the owner of the prior estate shall not be the protector, and does not appoint a protector in his stead, the Chancery Division will be protector during the continuance of such prior estate; and generally the court will be the protector when there is a prior estate but no protector.

The protector's consent.

The consent of the protector is necessary to enable the tenant in tail to create a larger estate than a base fee, and, also, for the enlargement of a base fee. The protector is subject to no control in the exercise of his power of consenting, and his agreement to withhold his consent is void. When, however, a married woman is protector, and her husband's concurrence is required in giving consent, a judge of the now Queen's Bench Division (formerly of the Common Pleas Court), can, under sect. 91 of 3 & 4 Will. 4, c. 74, dispense with his concurrence in a proper case, *e.g.*, while he is abroad or living in separation from his wife. Sects. 42—46 point out the way in which his consent is to be given. It may be given by the disentailing deed or by a distinct deed to be executed at the same time or previously to the disentailing deed. If it be by a distinct deed, such deed must be enrolled at the same time as, or before, the disentailing deed. The consent, when once given, is irrevocable; and a married woman may always consent as a *feme sole*, that is to say, that although the husband's concurrence, as already shown, may be required when the consent of his wife, the protector, is given, yet there is no necessity for the wife to acknowledge the deed by which the consent is given.

Disentailment can only be effected by deed;

Disentailment cannot be effected by will or contract. It must in every case be by deed. Formerly, if the tenant in tail was a married woman, the concurrence of her husband was necessary, and the deed had to be acknowledged, even where she was

equitable tenant in tail for her separate use. (See *Cooper* v. *Macdonald*.) But since the Married Women's Property Act, 1882, a married woman can bar the entail without her husband's consent, and without a deed acknowledged, if her marriage took place on or after 1st January, 1883, or even though it took place before that date, provided the estate tail was acquired by her after that date. The Lords Justices of the Court of Appeal have power, under their lunacy jurisdiction, to bar the estate tail of a lunatic so as to give a good title to a purchaser, but not so as to affect the interests of persons entitled under the limitations of the settlement to the proceeds of the sale. (*Re Pares*.) The disentailing deed is not required by the act to be in any particular form; but in whatever form it may be couched, it must be enrolled in the Central Office of the High Court within six months of execution.

which must be enrolled.

The act contains special provisions as to the disentailing of estates tail in copyholds. The general provisions of the act are to apply, *except that a legal estate tail is to be barred by surrender, and an equitable estate tail may be barred either by surrender or deed.* If the protector's consent is given by deed, it must be executed at the same time as, or before, the surrender, and produced to the steward, who must indorse such production on the deed, and enter the deed with the indorsement on the court rolls. If the consent is not given by deed, it must be given to the person taking the surrender and mentioned in the memorandum of surrender. Not only must every surrender barring an estate tail be enrolled on the court rolls, but also every deed by which an equitable estate tail is barred must be so entered, and, if the protector consents by a separate deed, it must be executed at the same time as, or before, the disentailing deed, and entered on the rolls, and be indorsed with a memorandum of such entry. The entry on the court rolls must in all cases be made within six months, but disentailing deeds of copyholds require no other enrolment.

As to disentailing copyholds.

By the 71st section, lands to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money subject to be invested in a similar purchase, are to be treated as the lands to be purchased. Any assurance under this section of leaseholds or money so circumstanced, must

Money to be invested in entailed estates treated as such.

be by assignment by deed enrolled in the Central Office within six months after execution. It has been held that money representing entailed land will not be paid out of court to a tenant in tail capable of disentailing it without the execution of a disentailing deed. (*Re Reynolds.*)

How disentailment usually carried out.

A disentailment is generally carried out by a deed made between the tenant in tail and a grantee to uses, the protector joining (when the estate is not in possession) to give his consent, unless it has been given by a separate deed. The tenant in tail conveys the premises to the grantee, to hold them to the grantee and his heirs freed and discharged from the estates tail of the tenant in tail, and all estates, &c. to take effect after or in defeasance of the same, to the use of the tenant in tail in fee simple, where there are prior estates subject to the same. The deed will require a ten shilling stamp; if, however, it operates to vest the property in a purchaser, it must be stamped with an *ad valorem* stamp like an ordinary conveyance.

Disentailment generally required for purposes of re-settlement.

As we said, a disentailment is generally effected prior to a re-settlement of the estate on the marriage of the eldest son of the tenant for life. The estate having been disentailed, the father usually charges his life estate with the payment of an annuity to the son during their joint lives, and a jointure for the son's intended wife should the son predecease him, and the son cuts down his interest in tail to a life estate, with a remainder, subject to a jointure for his wife and portions for the youngest children, to his children successively in tail, with remainders to his brothers and their children in tail, with an ultimate remainder in fee to the son. The re-settlement will also of course contain the usual powers and clauses contained in settlements as to the management of the estate, trustees, &c., and will be made subject to the charges for pin-money, jointure, and portions created by the former settlement.

In *Menzies* v. *Menzies*, it was held that if a tenant in tail is induced by representations, which are not consistent with the facts, made to him by his father's legal adviser, to bar the entail and re-settle the estate, he can set aside the deed, and this though the representations were not made fraudulently nor with the intent to deceive. The stamp duty on re-settlements is ten shillings.

V.—Appointments under Powers.

We have already frequently mentioned powers of appointment; we must now more particularly inquire into the exercise of such powers.

The different Sorts of Powers.

Definition

A power is a right to appoint property belonging to a person who may or may not have an interest in the property over which he possesses the power.

General and special powers.

If he may appoint the property to whom he pleases, the power is styled a *general* power; whereas, if he has only power to appoint to a particular person or persons, or members of a class, the power is called a *special* power.

Powers appendant and in gross.

If a person has a power over property in which he has an interest, the power is a power *appendant*, if, by the exercise of it, his interests will be affected, *e. g.*, a power of leasing vested in a tenant for life; and a power *in gross*, if, by the exercise of it, his interest will not be affected, *e. g.*, a power of a tenant for life to jointure his wife out of the property.

Powers collateral.

A power possessed by a person over property in which he has no interest, is styled a power *collateral*, *e. g.*, a power possessed by an executor to sell the real estate for payment of debts.

Who can exercise Powers.

Persons who are *sui juris* and able to convey property can, of course, exercise powers over property. As to persons under disability, a power cannot be exercised by a lunatic; but a married woman can exercise a power without the concurrence of her husband, and acknowledgment under 3 & 4 Will. 4 is not necessary, even if it takes effect out of her own estate. But if a power is given to be exercised while sole, it cannot be executed during coverture. (*Marquis of Antrim* v. *Duke of Buckingham.*) Further, an infant may exercise a power, if not coupled with an interest. But where an infant had a life estate in *personalty*, followed in default of issue by a general power of appointment, and, in default of appointment, the property was given to such infant absolutely, it was held that it was a pure

Lunatics cannot exercise a power; but a married woman can;

also an infant in some cases.

mandate, and did not deal with any property or interest of the infant, and that he could therefore exercise it during infancy. (*Re D'Angibau.*) But the case would be otherwise if the property were real property.

As to the Revocation, &c. of Appointments.

Donee may reserve power of revocation and new appointment.

The donee of a power, though he be not expressly authorized so to do by the instrument creating the power, may in his appointment reserve a power of revocation and new appointment. (*Adam* v. *Adam.*) But he cannot on a future appointment dispense with the formalities made necessary by the original instrument; for by the revocation the original power revives. (*Jones* v. *Lady Manchester.*) Where the power is exercised by deed, unless a power to revoke be reserved in the deed exercising the power, it cannot be revoked, though there be a power to revoke contained in the instrument creating the power (*Worrall* v. *Jacob*: see also *Hale* v. *Bond*); and even though the appointment is made to volunteers. If the power is to be executed upon a contingency, and an appointment be made before the contingency happens, it will in most cases become an effectual execution when the contingency happens. (*Ashford* v. *Cafe.*) But this will not be so when the contingency is as to the person who is to exercise the power (*Doe* d. *Calkin* v. *Tomlinson*); and when it is to be exercised with the consent of any person, such consent must be obtained prior to execution. (*Greenham* v. *Gibbeson.*) In *Fitzroy* v. *Harris*, where a father appointed a fund to his daughter on condition that she married with his consent, and the father became lunatic, and unable to give his consent, and the daughter married without it, it was held that the condition was a condition precedent, and as it had become incapable of fulfilment by the act of God, the appointment did not take effect.

How the Perpetuity Rule applies to Appointments under Powers.

Application of perpetuity rule to powers.

A point to which you must pay great attention in the exercise of powers of appointment is to see that you do not offend against the perpetuity rule. This rule, as you know, provides that all limitations by which the vesting of property is postponed

for a longer period than that of a life or lives in being, and twenty-one years afterwards (allowing also an additional period for gestation in the case of the appointee being *en ventre sa mère*), are absolutely void. (*Cadell* v. *Palmer*.) In applying this rule to appointments, you must remember that the appointee claims not under the appointment, but under the instrument creating the power, so that this must be looked to in answering the question whether the exercise of the power is or is not beyond the limits allowed by the rule.

General powers have no tendency to create a perpetuity.

There is a distinction between general and special powers. A general power leaves the donee free to dispose of the property in any way he may think proper, so that any estates created by him will be deemed to commence not from the creation of the power, but from the time of its exercise. But as to special powers, though the donee may have power to limit the property in fee, he cannot do so as if he himself were the owner in fee. The property is bound up by the instrument creating the power, so that under the appointment he can create no estate which would not have been validly created if limited in the instrument creating the power. And while a special power may embrace objects of any degree of remoteness, and yet not be void merely because attempting to authorize the appointment to persons not necessarily born, or the creation of interests not necessarily within the rule, the appointment under such powers must be strictly confined to such persons as come within the rule, dating the limit from the instrument creating the power.

Secus, special powers.

Power should be in favour of "remoter issue."

We have already mentioned, in connection with settlements of personal property (see *ante*, p. 402), that the power to appoint the settled funds is given in favour of the "remoter issue" of the marriage. This will enable the husband or wife to appoint a share to the issue of a deceased child, or of a child who has become bankrupt or aliened his interest under the settlement. It might be thought that such a power would be void, as offending the rule against perpetuities, for no issue might be born to the child of the marriage within the time allowed by the rule, *i. e.*, a life or lives in being, and twenty-one years afterwards, and the lives in being are those of the settlors. But the power may be validly exercised, provided the appointment

Reason.

under it be made so that the property must vest within the limited time. (See *Routledge* v. *Dorrell.*) The remoter issue are included, because the rule is that when a power is given to appoint among children, no appointment can be made even to the executors or administrators of those who may have died (*Boyle* v. *Bishop of Peterborough*); and if the power be to appoint among the members of a particular class, the fund cannot be appointed to a person who is not a member of that class. So that a power to appoint property to the children of the appointor will not enable the donee thereof to appoint to a grandchild. (*Alexander* v. *Alexander*, and *Bristowe* v. *Warde.* See also *Waring* v. *Lee.*) Again, under a power to appoint to younger children, a younger son, who afterwards becomes the eldest by the decease of an elder brother, can take nothing (*Chadwick* v. *Dolman*), though if any appointment has been made to him he will not have to refund. The words "younger brother" in powers of this nature mean any child who may not be entitled to the family estate. (See *Hall* v. *Hewer.*) When the power only authorizes an appointment among children, an appointment may still be made to the issue of a child, it being looked upon as an appointment to the child and an assignment by him to his issue; but as this can only be effected when the child is of age and is a party to and executes the deed of appointment, it is, as above stated, desirable to extend the power of appointing the trust funds to remoter issue. (*Routledge* v. *Dorrell; Thompson* v. *Simpson.*)

As to appointments in favour of daughters with a restraint.

Application of perpetuity rule thereto.

The question may arise whether, on the exercise of the usual power in a settlement to appoint among children, an appointment may be made to daughters and at the same time a restraint imposed upon anticipation, or whether the imposing of such a restraint will not offend against the perpetuity rule. The appointment will in any case be good even if the restraint be invalid, as transgressing the rule (see *Fry* v. *Capper*); the restraint will be invalid if at the time of the settlement the daughters were unborn. This would be so with an ante-nuptial settlement; but the restraint has been held valid when the daughter was, as might be in the case of a post-nuptial settlement, alive when the settlement giving the power was made.

Other cases in which the perpetuity rule may be transgressed.

In the exercise of the power the perpetuity rule may be transgressed in other cases. Thus, an appointment may be made under the power usually inserted in settlements to such uses as a child of the marriage may by deed or will appoint; but if the appointment be made to him to such uses as he shall by will alone appoint, this will offend against the rule and be void, unless the child was born at the time of the creation of the power, so as to be a life in being, which would not be the case in an antenuptial settlement. (See *Jebb* v. *Tugwell; Morgan* v. *Gromow.*)

Some miscellaneous points on appointments.

A person who has power to appoint to children absolutely may appoint to a child an estate for life, giving him also a general power of appointment by deed or will (*Bray* v. *Bree*); or a general power to appoint by will only, if the child is *in esse* at the time of the creation of the power, but not otherwise. (*Wollaston* v. *King.*) An estate cannot be appointed to an unborn child for life with remainder to his children as purchasers, *i.e.*, giving a distinct gift to such children. (*Brudenell* v. *Elwes.*) A gift to an object of the power, followed by a gift to a person who is not an object, is void only as to the gift over. (*Brown* v. *Nisbett.*) A gift to a stranger to the power, followed by a remainder to an object of the power, is good as to the gift of the remainder, and the property will, during the life of the stranger, go as in default of appointment. (*Crozier* v. *Crozier.*) An appointment to a class of persons, some of whom cannot take, as being outside the perpetuity limit, is void altogether. But if the *power* itself only authorizes an appointment among objects which are not too remote, while it is the *appointment* which offends against the rule, it would seem that the appointment will be good as to those persons who may be within the limits of the rule, as it is considered as an appointment to those only who are objects of the power. Where a power is given which is void for remoteness, limitations in default of appointment are not invalid unless they themselves also offend the perpetuity rule. (*Pidcock* v. *Frigout.*) Finally, powers of leasing, sale, and exchange, and such other powers usually contained in a settlement, are valid, though there be no express restriction of the exercise of them within the perpetuity rule. (*Lantsburry* v. *Collier; Peters* v. *East Grinstead Railway Co.;* and *Re Sudeley and Baines.*)

Defective Appointments.

In exercising a power, the appointor must take care to obey rigidly the terms and formalities laid down in the instrument giving the power. If he does not do so, the appointment will be defective and bad in most cases. Thus, if the appointment is to be exercised by a will "referring to the power," it will not be well exercised by a general disposition of property in the will not expressly referring to the power, and sect. 27 of the Wills Act, 1837, does not apply to the case, as such a power is not a power to appoint in any manner the testator thinks proper within the act. (*Phillips* v. *Cayley*.) If, however, the defect consist in having only two witnesses to a deed or will, instead of three or more, as required by the instrument giving the power, the appointment is valid by the provisions of 1 Vict. c. 26, as to wills, and 22 & 23 Vict. c. 35, as to deeds; and with regard to other defects of a formal and not material nature (*e.g.*, the appointment being by will instead of by deed), a court of equity will, where the appointee is a wife, child, creditor, charity, or purchaser (including a mortgagee and lessee, and possibly an intended husband), uphold the appointment. For particulars on this subject of defective appointments, we must refer you to the Chapter on Accident in some work on the Principles of Equity.

Illusory Appointments.

Another point, to which we must call your attention, in connection with appointments under special powers, is the law relating to *illusory* appointments.

As to appointments under powers.

You will remember that, prior to the 16th July, 1830, it was necessary under a non-exclusive power, *i.e.*, one which did not give to the appointor an option of excluding any object intended to be benefited by the power, for the appointor to appoint a portion of the fund to every object of the power. At law it was immaterial how small the share appointed to any object might be; but in equity it was necessary to appoint some substantial share, or the appointment was held *illusory* and void. (*Gainsford* v. *Dunn*.) But then was passed the statute 11 Geo. 4 & 1 Will. 4,

Illusory appointments.

c. 46, which rendered illusory appointments, *i.e.*, appointments of merely nominal shares, good in equity as well as at law. But under this statute it was necessary to appoint some share, however small, to each of the objects of the power. (See *Gainsford* v. *Dunn*.) Now, however, in the exercise of a power of appointment after the 30th July, 1874, it is possible entirely to exclude any object of the power, by virtue of 37 & 38 Vict. c. 37, unless there is some express declaration to the contrary in the instrument creating the power.

Exclusive appointments.

Excessive and Fraudulent Appointments.

The execution of a power must not be excessive nor fraudulent.

There are still two more points on appointments under special powers to call your attention to, namely, the excessive execution of the power and a fraudulent exercise of it. If the appointment include objects not intended by the terms of the power to be benefited, the appointment will not be altogether void, but it will be void as to the excess only, and good as to the shares intended for the objects of the power, provided they can be separately ascertained. When an appointment by will of real property is excessive, the *cy-près* doctrine is applied. Thus, if a parent, having a power of appointment over lands among his *children* (not issue), appoints the same by will to his son for life, with remainder to that son's son in tail, the remainder is void, but the son's life estate is enlarged into an estate tail. (*Alexander* v. *Alexander*, and *Re Kerr's Trusts*.) And a fund, instead of being directly appointed to an object of the power, may be appointed to a trustee in trust for him (*Thirnton* v. *Bright*); or it may be appointed to trustees upon trust to sell and divide the proceeds among the objects. (*Fowler* v. *Cohn*.)

What is a fraudulent exercise of a power.

As to what constitutes a fraudulent exercise of a power, the rule is, that it must be exercised for the benefit of the child, and not indirectly for the appointor's own benefit; so that if the power be exercised with an ultimate view to secure some advantage to the appointor, or to any person other than an object of the power, the appointment will be void. Thus, a father will not be allowed to make an immediate appointment to an infant child with the idea of becoming entitled to the fund as the

child's personal representative if he should die. (*Cunnyngham* v. *Thurlow*; *Wellesley* v. *Mornington*.) But the mere fact that an appointment is made to an infant, that the father, the appointor, will become entitled to the fund on the child's decease, and that the infant is in no immediate need of the property appointed, will not necessarily render the appointment void. (*Henty* v. *Wray*; *Butcher* v. *Jackson*; *Beere* v. *Hutchinson-Hoffmister*; *Wellesley* v. *Mornington*.) In *Radcliffe* v. *Bewes*, a father had a power to appoint some settled funds, of which he was tenant for life, among his children, who, in default of appointment, were, subject to the father's life interest, entitled to the funds on attaining twenty-one. There were two children, both of whom attained twenty-one, and so, subject to the power and the life interest of the father, became entitled to the settled funds. One of the children died subsequently, intestate. The father surrendered his life estate, released the power of appointment, and divided the settled funds, giving one half to his surviving child, and taking the other half himself as the representative of the deceased child, and the court held that there had been no fraud on the power.

Release of Powers.

All powers can now be released and disclaimed.

As to the release and disclaimer of powers, formerly the rule was, that powers appendant and in gross could, but those simply collateral could not, be released. (See *West* v. *Burney*.) But by sect. 52 of the Conveyancing Act, 1881, a person to whom a power, whether coupled with an interest or not, is given, may by deed release or contract not to exercise the power, and this whether the power was created by an instrument coming into operation before or after the commencement of the act. This section did not, however, apply to the disclaimer of powers, and this omission was supplied by the Conveyancing Act, 1882, sect. 6, under which the donee of a power, whether coupled with an interest or not, and whether created by an instrument coming into operation before or after the commencement of the act, may by deed disclaim the power, and the effect of such disclaimer will be that he will not be able to exercise, or join in exercising, it; but it

may be exercised by the others or other, or the survivor of the other persons to whom the power was given, unless the contrary be expressed in the instrument creating the power. Under sect. 52 of the Conveyancing Act, 1881, it has been held that a power which is coupled with a trust or duty may not be released, but can only be extinguished by the trustee making a proper and irrevocable appointment. (*Eyre* v. *Eyre.*)

The stamp duty on appointments under powers (when not exercised by will) is ten shillings; but see sect. 62 of the Stamp Act, 1891.

Part VIII.—CONVEYANCING COSTS.

The old principle of conveyancing costs.

Our task would hardly be complete without drawing your attention to the remuneration to which, as a solicitor, you are entitled for conveyancing business; and we propose in this, the concluding part of the book, to deal with this important branch of the subject, the law on which is now regulated by the Solicitors' Remuneration Act, 1881, and the Solicitors' Remuneration Order, 1882. Prior to this act and order coming into operation, the principle on which solicitors' bills of costs for conveyancing business were taxed in this country, was the length of the document drawn, and not the importance of the document, nor the skill, labour or responsibility involved in its preparation. The result of such a system you will readily imagine, namely, that documents were drawn at unnecessary length, and made to contain clauses and words which might well be left out, since solicitors, as well as the rest of the community, must pay regard to their pecuniary interests. That such a system—by which an educated and skilled professional man was paid, like a mere copyist, at the rate of so much for every folio of a deed or document he drew, no matter how important or intricate the nature of the matter to which the deed related, or how much skill had been brought to bear on its preparation—was allowed to continue down to the date of the Solicitors' Remuneration Act and Order coming into operation, *i. e.*, the 1st January, 1883, is indeed remarkable, especially having regard to the great reforms which have taken place in recent years. It is true, that during the present reign certain steps were taken to improve the existing state of things; thus, in 1845, two statutes were passed (8 & 9 Vict. c. 119, and 8 & 9

Old system.

Iniquity thereof.

Vict. c. 124), by which certain short deeds were made sufficient for certain purposes, for which the solicitor engaged was to be paid by the skill and labour employed, and the responsibility incurred. These two statutes proved, however, practically dead letters. The next legislative enactment on the subject took place in 1870. The Solicitors Act of that year, besides allowing a solicitor to contract with his client for *future* costs (a right which did not previously exist), enabled the taxing master to take into consideration, when taxing a solicitor's bill, not only the length of the document, but also the skill, labour, and responsibility involved. This salutary amendment had, however, but little real effect, and the old system of charging by length of documents drawn, copied, &c., and by the number of attendances made on the client, continued, to the trouble and dissatisfaction of lawyers, and probably also to their clients, who must necessarily have found great difficulty in understanding the effect of deeds containing a mass of unnecessary verbiage. Now one of the main objects of the Conveyancing Act, 1881, was, as you know, to shorten and simplify all kinds of conveyances; but the provisions of that important and useful statute being in this particular matter of an optional nature, would undoubtedly have proved inoperative had not some scheme been arranged by which solicitors who adopted the statute, and prepared under its provisions concise and intelligible deeds, should be entitled on taxation to as high a remuneration as solicitors of the conservative and old school type, who, ignoring the beneficial effects of the new act, continued to prepare their deeds at their former unnecessary and absurd length. The scheme was carried out by the Solicitors' Remuneration Act, 1881, by which provision was made for the drawing up by the persons therein enumerated of a scale or scales to regulate the remuneration of a solicitor in conveyancing business. The statute, with the idea no doubt of inducing solicitors to accept and act on the Conveyancing Act, gave wide powers to the persons appointed to draw up the order as to mode and amount of remuneration to be fixed by the scale or scales to be drawn up.

Partial statutory remedy.

Complete statutory remedy.

The order was issued in 1882, and was under the hands of the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, and the then President of the Liverpool Law Society

The remuneration order.

(it is noticeable that the then President of the Incorporated Law Society did not append his signature to the order), and consists of twelve clauses, followed by two schedules.

The First Schedule.

The First Schedule is divided into two parts: part I. contains a scale of charges to be allowed to a solicitor on sales, purchases and mortgages, whether he is acting for vendor, purchaser, mortgagor or mortgagee. The scale here is based on the amount of the purchase or mortgage money. The scale is followed by twelve rules made to meet special circumstances: part II. contains two scales of charges, one for leases at rack rent (except mining leases and building leases), and the other for building leases and leases not at rack rent (except mining leases), and for conveyances for a freehold estate subject to a rent. The remuneration here is based on the amount of the rent. This part of the schedule is followed by six rules intended to meet special cases.

The Second Schedule.

The Second Schedule regulates the remuneration for preparing, &c., wills, settlements, mining leases and other documents not coming within the first schedule, or with regard to which, although within the first schedule, the solicitor has, as he is empowered to do by the order, elected, before undertaking the business, to be paid for by the scale given in this second schedule. The remuneration allowed by this second schedule is based on the old system of charging, namely, the length of the document, the sheets of abstract, the number of the attendances, &c. In fact, the charges for the class of work falling within this schedule are to be the same as those before existing, except as altered in the schedule.

By the schedule a more liberal scale than that formerly recognized is allowed in certain cases; thus, 10*s.* instead of 6*s.* 8*d.* is the charge for each attendance; 2*s.* per folio for drawing instead of 1*s.*, and the taxing master is empowered to increase or *diminish* the charges in special cases. The second schedule also regulates the remuneration for all business to which Schedule I. relates if the matter falls through and is not completed.

Costs are now based on importance of business.

The order came into operation on the 1st January, 1883, and, as you will gather from the above brief outline, solicitors are now, for most conveyancing business, paid for their services on a proper principle, namely, according to the importance of the

transaction and the consequent degree of responsibility involved, unless they choose to resort to the old plan, by giving notice to their client of their intention to be remunerated by the present system as altered by the scale of Schedule II. Before proceeding to give details of the order, we would draw your attention to the fact that a solicitor may, under the express provisions of sect. 8 of the Remuneration Act, either before, after, or in the course of the transaction of any business, enter into a written agreement with his client (signed by the party to be bound thereby), whereby he may be remunerated by a gross sum, commission or percentage, or a salary or otherwise, and the effect of this agreement will be to prevent the remuneration allowed by the order being applicable; but in other cases the order applies and regulates the remuneration for all kinds of conveyancing business. We will now proceed to consider the order in detail, and, to the better enable you to understand the effect of the order, we will divide our subject into five divisions or heads:

I. The scale of charges for sales, purchases, and mortgages (the transactions being completed), and the rules relating thereto, being Part I. of Schedule I. of the order.

II. The scale of charges for leases or conveyances at a rent or agreement for the same, other than mining leases and agreements therefor (the transactions being completed), and the rules relating thereto, being Part II. of Schedule I. of the order.

III. The scale of charges for taking instructions, drawing and perusing wills, settlements, mining leases and other documents, not set out above, and for all transactions which are not completed, whether set out above or not, being matters included in Schedule II. of the order.

IV. Some miscellaneous provisions.

V. Some important decisions on the act and order.

I. The Scale of Charges for Sales, Purchases and Mortgages (the transactions being completed), and the Rules relating thereto, being Part I. of Schedule I. of the Order.

Scale for sales, purchases, and mortgages.

We extract the following from the order itself, deeming it advisable to set out the scale and rules *in extenso*, the above and other headings to the rules being, however, our own, and added merely for convenience.

SCALE.

	1. For the 1st 1,000*l.*	2. For the 2nd and 3rd 1,000*l.*	3. For the 4th and each subsequent 1,000*l.* up to 10,000*l.*	4. For each subsequent 1,000*l.* up to 100,000*l.**
	Per 100*l.*	Per 100*l.*	Per 100*l.*	Per 100*l.*
Vendor's solicitor for negotiating a sale of property by private contract	20*s.*	20*s.*	10*s.*	5*s.*
Vendor's solicitor for conducting a sale of property by public auction, including the conditions of sale—				
When the property is sold	20*s.*	10*s.*	5*s.*	2*s.* 6*d.*
When the property is not sold, then on the reserved price	10*s.*	5*s.*	2*s.* 6*d.*	1*s.* 3*d.*
[N.B.—A minimum charge of 5*l.* to be made, whether a sale is effected or not.]				
Vendor's solicitor for deducing title to freehold, copyhold or leasehold property, and perusing and completing conveyance (including preparation of contract or conditions of sale, if any)..	30*s.*	20*s.*	10*s.*	5*s.*
Purchaser's solicitor for negotiating a purchase of property by private contract	20*s.*	20*s.*	10*s.*	5*s.*
Purchaser's solicitor for investigating title to freehold, copyhold or leasehold property, and preparing and completing conveyance (including perusal and completion of contract, if any)	30*s.*	20*s.*	10*s.*	5*s.*
Mortgagor's solicitor for deducing title to freehold, copyhold or leasehold property, perusing mortgage and completing ..	30*s.*	20*s.*	10*s.*	5*s.*
Mortgagee's solicitor for negotiating loan	20*s.*	20*s.*	5*s.*	2*s.* 6*d.*
Mortgagee's solicitor for investigating title to freehold, copyhold or leasehold property, and preparing and completing mortgage	30*s.*	20*s.*	10*s.*	5*s.*
Vendor's or mortgagor's solicitor for procuring execution and acknowledgment of deed by a married woman	2*l.* 10*s.* extra.			

* Every transaction exceeding 100,000*l.* to be charged for as if it were for 100,000*l.*

RULES.

Sales in separate lots.

1. The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots.

Attempted sales—Sale after previous abortive auctions.

2. The commission on an attempted sale by auction in lots is to be chargeable on the aggregate of the reserved prices. When property offered for sale by auction is bought in and terms of sale are afterwards negotiated and arranged by the solicitor, he is to be entitled to charge commission according to the above scales on the reserved price where the property is not sold, and also one-half of the commission for negotiating the sale. When property is bought in and afterwards offered by auction by the same solicitor, he is only to be entitled to the scale for the first attempted sale, and for each subsequent sale ineffectually attempted he is to charge according to the present system as altered by Schedule II. hereto. In case of a subsequent effectual sale by auction, the full commission for an effectual sale is to be chargeable in addition, less one-half of the commission previously allowed on the first attempted sale. The provisions of this rule as to commission on sales or attempted sales by auction are subject to the provisions of the order.

(See *Re Beck* and *Re Inderwick*, *post*, pp. 587, 588.)

Solicitor acting for both mortgagor and mortgagee.

3. Where a solicitor is concerned for both mortgagor and mortgagee, he is to be entitled to charge the mortgagee's solicitor's charges, and one-half of those which would be allowed to the mortgagor's solicitor up to 5,000*l.*, and on any excess above 5,000*l.*, one-fourth thereof.

Perusal of drafts for several persons.

4. If a solicitor peruses a draft on behalf of several parties having distinct interests, proper to be separately represented, he is to be entitled to charge 2*l.* additional for each such party after the first.

Solicitor acting for person joining in conveyance, &c.

5. Where a party other than the vendor or mortgagor joins in a conveyance or mortgage, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II. hereto.

Conveyance and mortgage prepared by same solicitor.

6. Where a conveyance and mortgage of the same property are completed at the same time, and are prepared by the same solicitor, he is to be entitled to charge only half the above fees for investigating title, and preparing the mortgage deed, up to 5,000*l.*, and, on any excess above 5,000*l.*, one-fourth thereof, in addition to his full charges upon the purchase-money and his commissions for negotiating (if any).

How fractions of 100*l.* to be charged.

7. Fractions of 100*l.*, under 50*l.*, are to be reckoned as 50*l.* Fractions of 100*l.*, above 50*l.*, are to be reckoned as 100*l.*

Remuneration in small cases.

8. Where the prescribed remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee, is to be 3*l.*

Sale subject to incumbrances.

9. Where a property is sold subject to incumbrances, the amount of the incumbrances is to be deemed a part of the purchase-money, except where the mortgagee purchases, in which case the charge of his solicitor shall be calculated upon the price of the equity of redemption.

Transfers of mortgages—Further charges.

10. The above scale as to mortgages is to apply to transfers of mortgages where the title is investigated, but not to transfers where the title was investigated by the same solicitor on the original mortgage or on any previous transfer; and it is not to apply to further charges where the title has been so previously investigated. As to such transfers and further charges the remuneration is to be regulated according to the old system as altered by Schedule II. hereto. But the scale for negotiating the loan shall be chargeable on such transfers and further charges where it is applicable.

Commission for conducting sales, &c.

11. The scale for conducting a sale by auction shall apply only in cases where no commission is paid by the client to an auctioneer. The scale for negotiating shall apply to cases where the solicitor of a vendor or purchaser arranges the sale or purchase and the price, and the terms and conditions thereof, and no commission is paid by the client to an auctioneer, or estate or other agent. As to a mortgagee's solicitor, it shall only apply to cases where he arranges and obtains the loan from a person for whom he acts. In case of sales under the Lands Clauses Consolidation Act, or any other private or public act under which the vendor's charges are paid by the purchaser, the scale shall not apply.

(See *Re Beck*, *post*, p. 587; *Re Wilson*, *post*, p. 589; and *Re The Merchant Taylors' Company*, *post*, p. 590.)

Charges allowed where no commission charged for negotiating sales, &c.

12. In cases where, under the previous portion of this schedule, a solicitor would be entitled to charge a commission for negotiating a sale or mortgage, or for conducting a sale by auction, and he shall not charge such commission, then he shall be entitled to charge the rates allowed by the first column on all transactions up to 2,000*l.*, and to charge in addition those allowed by the second column on all amounts above 2,000*l.* and not exceeding 5,000*l.*, and further to charge those allowed by the third column on all amounts above 5,000*l.* and not exceeding 50,000*l.*, instead of the rates allowed up to the amounts mentioned in those columns respectively.

II. The Scale of Charges for Leases or Conveyances at a Rent and Agreements for the same, other than Mining Leases and Agreements therefor (the transactions being completed), and the Rules relating thereto, being Part II. of Schedule I. of the Order.

Scale for leases other than mining leases.

There are two scales for this class of business given, one relating to leases at rack rent, and the other to building leases and conveyances of a freehold estate reserving a rent. Mining leases are excepted and brought within Schedule II., but all agreements for leases, not being mining leases, and conveyances at a rent, are regulated by the scales, as will be seen from the following, which we extract from the order:—

(a) *Scale of Charges for leases, agreements for leases at rack rent (other than mining leases or leases for building purposes, or agreements for the same).*

Lessor's solicitor for preparing, settling, and completing lease and counterpart:—

Where the rent does not exceed 100*l.*	7*l.* 10*s.* per cent. on the rental, but not less in any case than 5*l.*
Where the rent exceeds 100*l.* and does not exceed 500*l.*	7*l.* 10*s.* in respect of the first 100*l.* of rent, and 2*l.* 10*s.* in respect of each subsequent 100*l.* of rent.
Where the rent exceeds 500*l.*	7*l.* 10*s.* in respect of the first 100*l.* of rent, 2*l.* 10*s.* in respect of each 100*l.* of rent up to 500*l.*, and 1*l.* in respect of every subsequent 100*l.*
Lessee's solicitor for perusing draft and completing	One-half of the amount payable to the lessor's solicitor.

(See *In re Emmanuel and Simmonds*, *post*, p. 589.)

(b) *Charges as to conveyances in fee or for any freehold estate, or building leases, reserving rent, or other long leases not at rack rent (except mining leases), and agreements for the same respectively:—*

Vendor's or lessor's solicitor for preparing, settling, and completing conveyance and duplicate, or lease and counterpart:—

Amount of Annual Rent.		Amount of Remuneration.
Where it does not exceed..	5*l.*	5*l.*
Where it exceeds 5*l.* and does not exceed.....	50*l.*	The same payment as on a rent of 5*l.*, and also 20 per cent. on the excess beyond 5*l.*
Where it exceeds 50*l.* but does not exceed.....	150*l.*	The same payment as on a rent of 50*l.*, and 10 per cent. on the excess beyond 50*l.*
Where it exceeds	150*l.*	The same payment as on a rent of 150*l.*, and 5 per cent. on the excess beyond 150*l.*

Where a varying rent is payable, the amount of annual rent is to mean the largest amount of annual rent.

Purchaser's or lessee's solicitor for perusing draft and completing ..... } One-half of the amount payable to the vendor's or lessor's solicitor.

RULES.

Charges for abstract of title.

1. Where the vendor or lessor furnishes an abstract of title, it is to be charged for according to the old system as altered by Schedule II.

Solicitor engaged for both parties.

2. Where a solicitor is concerned for both vendor and purchaser, or lessor and lessee, he is to charge the vendor's or lessor's solicitor's charges, and one-half of that of the purchaser's or lessee's solicitor.

Mortgagor or mortgagee joining in conveyance, &c.

3. Where a mortgagee or mortgagor joins in a conveyance or lease, the vendor's or lessor's solicitor is to charge 1*l.* 1*s.* extra.

A third person joining in conveyance, &c.

4. Where a party other than a vendor or lessor joins in a conveyance or lease, and is represented by a separate solicitor, the charges of such separate solicitor are to be dealt with under the old system as altered by Schedule II.

Consideration consisting partly of rent and partly of payment down.

5. Where a conveyance or lease is partly in consideration of a money payment or premium, and partly of a rent, then, in addition to the remuneration hereby prescribed in respect of the rent, there shall be paid a further sum equal to the remuneration on a purchase at a price equal to such money payment or premium.

Fractions of 5*l.*

6. Fractions of 5*l.* are to be reckoned as 5*l.*

III. The Scale of Charges for taking Instructions for Drawing and Perusing Wills, Settlements, and other Documents not set out above, and for all Transactions which are not completed, whether set out above or not, being matters included in Schedule II. of the Order.

Scale for wills, settlements, &c.

The remuneration for this business is according to the old system as altered by the Second Schedule. We have already explained the principle of remuneration as it formerly existed, and we need not further dilate upon it. You will bear in mind, that, in addition to the above matters, the scale and terms of Schedule II., which we set out below, apply also to cases within rule 5 of Part I. of Schedule I., and to cases within rules 1 and 4 of Part II. of the same Schedule (*vide supra*). The following is a copy of Schedule II.:—

INSTRUCTIONS FOR AND DRAWING AND PERUSING DEEDS, WILLS, AND OTHER DOCUMENTS.

Such fees for instructions as, having regard to the care and labour required, the number and lengths of the papers to be perused, and the other circumstances of the case, may be fair and reasonable. In ordinary cases, as to drawing, &c., the allowance shall be—

For drawing	2*s.* per folio.
For engrossing	8*d.* ,, ,,
For fair copying	4*d.* ,, ,,
For perusing	1*s.* ,, ,,

ATTENDANCES.

	s.	*d.*
In ordinary cases	10	0

In extraordinary cases the taxing master may increase or diminish the above charge if for any special reasons he shall think fit. (See *Re Mahon and Sayer*, *post*, p. 592.)

ABSTRACTS OF TITLE (WHERE NOT COVERED BY THE ABOVE SCALE).

	s.	*d.*
Drawing each brief sheet of 8 folios	6	8
Fair copy	3	4

(See *Re Lacey*, *Re Field*, and *Fleming* v. *Hardcastle*, *post*, pp. 588, 589.)

JOURNEYS FROM HOME.

	£	*s.*
In ordinary cases for every day of not less than seven hours employed on business or in travelling	5	5
Where a less time than seven hours is so employed..per hour	0	15

In extraordinary cases the taxing master may increase or diminish the above allowance if for any special reasons he shall think fit.

IV. Some Miscellaneous Provisions.

(1) The order laying down the above scales of remuneration is to take effect from and after the 31st December, 1882.

(See *Re Lucey*, *Re Field*, and *Fleming* v. *Hardcastle*, *post*, pp. 588, 589.)

(2) The scales given in Heads I. and II. do not apply to transactions respecting real property the title to which has been registered under 25 & 26 Vict. c. 53; 25 & 26 Vict. c. 67; and 38 & 39 Vict. c. 87.

(3) The scales given in Heads I. and II. above do not apply unless the business is completed, so that if a contemplated purchase, or mortgage, or lease, falls through before completion, the solicitor will not be paid by a scale reckoned on the amount of the purchase, or mortgage, or rent, but by the length of the documents he has drawn, &c., the number of attendances made, according to the old system as altered by scale of charges given in Head III. above.

(4) Drafts and copies made in the course of any conveyancing business are to be the property of the client.

(5) The scales given for the class of business treated of under Heads I. and II. above do not include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid on searches to public offices, or registration, or to stewards of manors, costs of extracts from any register, record or roll, or other disbursements reasonably and properly paid, *nor any extra work occasioned by changes occurring in the course of any business, such as death or insolvency of a party to the transaction, nor is it to include any business of a contentious character, nor any proceedings in any court;* but they do include law stationer's charges, and allowances for time to the solicitor and his clerks, and for copying, and parchment, and all other similar disbursements.

(See *Stamford* v. *Roberts*, *post*, p. 588; and *Fleming* v. *Hardcastle*, *post*, p. 589.)

(6) In respect of any business which is *required to be and is* by special exertion carried through in an exceptionally short space of time, a solicitor may be allowed a proper additional remuneration for the special exertion.

(7) As we have already pointed out, a solicitor may, in any case, prevent the scales prescribed in Schedule I. of the order—*i.e.*, for the classes of business set out in Heads I. and II. above—applying, by communicating in writing to his client, *before undertaking the business*, his election to be paid by the old system of remuneration as altered by Schedule II. of the order. (See Head III. above; and *Re Allen*, *post*, p. 588; *Hester* v. *Hester*, *post*, p. 588; and *Metcalfe* v. *Metcalfe*, *post*, p. 588.)

(8) Security for the amount of costs to become due to the solicitor for business to be transacted by him may be given by the client, and accepted by the solicitor, and security may also be given for interest on such amount, provided that the interest does not commence till the amount due is ascertained by agreement or taxation.

(9) Interest may be charged by a solicitor at four per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demanding payment from the client. The demand to be made, in cases where the payment is to be made by an infant or out of a fund not presently available, on the parent or guardian, or the trustee, or other person liable. "Demanding payment," means demanding payment of the bill, and a special demand for payment of interest is not necessary, but interest will run from one month after the bill is sent in. (*Blair and Girling* v. *Corder.*)

V. Some important Decisions on the Remuneration Act and Order.

Re Beck, In re Hartington's Estate.—Decided that a vendor's solicitor is entitled to commission for conducting the sale, and a proper sum for auctioneer's charges, where the property was offered by public auction and afterwards sold by private contract.

Re Lacey.—The Court of Appeal decided two points, viz.: (1) that the Remuneration Order applied to a conveyancing transaction which was commenced before, but concluded after, 31st December, 1882; (2) that the scale charge could only be

made where the work mentioned in the scale has been in substance done. Consequently, in this case it was held that where the purchaser dispenses with an investigation of the title, and the title is not deduced, the remuneration must be according to Schedule II., and not according to the scale allowed in Part I. of Schedule I.

In re Inderwick.—A vendor's solicitor is entitled to a fee for conducting a sale by private contract effected on the same day as the property was offered, though abortively, by public auction. The auctioneer's charge of the quarter per cent. on the purchase-money was also held to be, in such a case, payable out of the contract price. (See also *Ward* v. *Holmes*, *post*, p. 590.)

Stamford v. *Roberts.*—Notwithstanding the language of the Solicitors' Remuneration Act, 1881, and of the Remuneration Order, Kay, J., held that the scale charge allowed for conveyancing business applied to conveyancing work done by a solicitor in connection with an action in the Chancery Division. This rule was quite recently adopted by the Court of Appeal in *Fleming* v. *Hardcastle*, *infra.*

Re Allen.—The election to charge on the old plan must be made before the business is undertaken. It is too late to elect after writing a letter as preliminary to the business.

Hester v. *Hester.*—It is too late to elect to receive the old remuneration after having done *any* work in the matter for which you could charge did the scale not apply.

Metcalfe v. *Metcalfe*—It is too late to elect to receive the old remuneration after conferring with your client as to the mode of sale and title.

In re Weddall, Parker v. *Parker.*—A solicitor is entitled under rule 11 (*ante*, p. 582), to charge a "negotiating fee" where the mortgagee has been introduced to the mortgagor by another person. In this case one A., solicitor for the mortgagor, wrote to B. asking him if he knew of anyone ready to advance 2,000*l.* on mortgage. B. wrote to C., his mother-in-law, and stated that he had gone into the proposed security. C. wrote to Messrs. Weddall asking for their advice. Messrs. Weddall

investigated the matter, had the property valued, and ultimately, the inquiries being to their satisfaction, C. advanced the money. Pearson, J., held that Messrs. Weddall were entitled to the negotiation fee.

Re Field.—The Court of Appeal decided that a solicitor could not, in addition to the scale charge for a lease, claim separate remuneration for interviews and attendances, including journeys, which resulted in the agreement for the lease, and led to the heads of the terms upon which the lease was prepared. In this case, also, the principle laid down in *Re Lacey (supra)*, that the Remuneration Order applied to a transaction the negotiations for which took place before, but which was not completed till after, 31st December, 1882, was followed.

Re Emmanuel and Simmonds.—The scale allowance for leases includes any preliminary agreement for the lease, so that a solicitor who prepares such an agreement for a lease, and then the lease, is only entitled to the scale charge.

Re Wilson.—The Court of Appeal decided that if a solicitor employs a surveyor, to whom the taxing master allows remuneration for preparing plans, dividing the property into lots, &c., he (the solicitor) is not entitled to the scale for conducting the sale of the property, for in such a case the surveyor has done, and been paid for, much of what properly constitutes the conduct of a sale. Whether the employment of an auctioneer merely to conduct the sale in the auction room was sufficient to deprive the solicitor of the "conducting fee," was, the court said, a question more difficult to answer, looking to the words of the order, which provides that the remuneration prescribed by Schedule I. is not to include auctioneer's or valuer's charges. The point was not decided by the court, and so still remains an open one. (See also *Wood* v. *Calvert.*)

In *Fleming* v. *Hardcastle* the Court of Appeal laid down four points: (1) The act and order apply to business commenced before, but not completed till after, 31st December, 1882. This had been already decided in *Re Lacey* and *Re Field* (*supra*). (2) The act and order apply to conveyancing business in connection with an action in the Chancery Division. This

follows *Stamford* v. *Roberts*. (3) The scale fee applies even though the title to the whole of the property had not been thoroughly investigated, provided the investigation had proceeded as far as necessary. (Compare *Re Lacey, supra.*) (4) In a case where the purchaser's solicitor prepares the contract for sale, he is entitled to charge for it under Schedule II., in addition to charging the usual scale fee for investigating the title, &c., because the scale fee in favour of the *purchaser's* solicitor does not include the preparation of the contract.

In *Re Merchant Taylors' Company*, Chitty, J., decided that rule 11 of Schedule I., Part I., of the order applies so as to entitle a solicitor to charge the scale fee on a re-investment in land of money paid into court under the Lands Clauses Consolidation Act.

Re Herbert.—Upon a common order to tax, the client cannot dispute the retainer as to the whole of the bill, but he can do so as to any particular items or charges. This case was followed in *Re Jones.*

Re Kellock.—A bill once delivered to a person liable to pay it cannot be withdrawn so as to prevent that person from taxing it.

Ex parte Mayor of London, Re M. & D. Railways.—There may be an "investigation into title" which will entitle a solicitor to charge therefor, although no abstract of title is produced, as is done in ordinary cases.

Re Pybus.—A bill may be taxed notwithstanding the lapse of a twelvemonth after its delivery, on special reasons being shown, *e.g.*, where there are erroneous and serious over charges.

Re Robertson.—A solicitor making advances to a client on the security of real property cannot charge 1*s.* a folio for perusing the title deeds.

Ward v. *Holmes.*—The provision in Schedule I., Part I., of the order, under which a solicitor who carries through a sale, but without success, is entitled to a full commission of an effectual sale, less one-half the commission allowed on the unsuccessful

attempt, only applies where the same solicitor acts on both occasions; and when there is a change of solicitor the new solicitor will not get any costs for the abortive sale, which must be dealt with under rule 2 (c) of the general order.

Re Eley.—A solicitor who merely introduces the parties between whom a loan is afterwards arranged cannot claim the negotiating fee. (And see *Gradwell* v. *Aichison*, *ante*, p. 276.)

Hill v. *Spurgeon.*—The right of the solicitor under rule 6 to elect to charge under the old system, as altered by Schedule II., may be exercised as to business pending at the time when the order came into operation, and the election may be made after the order came into operation, but before any further work is done by the solicitor.

Re Stewart.—"Undertaking business," within rule 6, means not merely accepting the retainer, but entering upon the work, *i. e.*, doing something for which the solicitor is entitled to make a charge.

Re Montague, Scott and Baker.—An agreement with the client as to remuneration under sect. 8 must be for a lump sum, or a commission in lieu of, and not in addition to, the solicitor's remuneration.

Newbould v. *Bailward.*—When on a sale the auctioneer's commission is paid by the client, rule 11 does not deprive the solicitor of all remuneration for work done in respect of the conduct of the sale, but he is entitled for such work as on a *quantum meruit.* (See also *Burd* v. *Burd.*)

Fergusson to Buckley.—To entitle a solicitor to the percentage charges under Schedule I., Parts I. and II., of the General Order, he must have deduced the title, and of such deduction of title making searches is an essential part.

Re Marten.—The remuneration of a lessor's solicitor does not cover negotiations carried on by him, as to letting the property, with persons other than the person to whom the lease is ultimately granted.

Salthouse v. *Read.*—The taxing master may increase or diminish the charges, not only for "attendances," but for drawing documents, and "documents" include particulars of sale.

Re Robson.—When a lease is granted partly in consideration of a premium and partly of a rent, the lessor's solicitor is entitled to the scale fee under rule 5 in respect of the premium, even though no abstract of the lessor's title is furnished to the lessee.

Re Palmer.—A mortgagor who employs a solicitor to negotiate a loan is a "client" within sect. 1 of the act.

Re Smith, Piseno & Co.—The cost of an attempted ineffectual sale of property, when there is no probability of the sale being effected for years to come, should be taxed under rule 2 of the General Order.

Re Mahon and Sayer.—(1) In taxing conveyancing costs the taxing master should allow 10*s.* for ordinary attendances, and more *or less* for an extraordinary attendance. (2) For drawing opinion for counsel, the taxing master should allow 2*s.* per folio under Schedule II., Part II.

In re Stuart.—In order that an agreement between solicitor and client as to costs may be fair and reasonable within the meaning of the Solicitors Act, 1870, the client must thoroughly understand all the facts of the case. The agreement will not be upheld merely because the solicitor acted honestly and honourably in the matter.

Bissell v. *Bradford Tramways Co., Limited.*—By taking security from his client for costs, a solicitor *primâ facie* waives his lien; and to rebut this inference the solicitor must be prepared with evidence that he expressly reserved it, and that he put all the facts before his client in a clear and intelligible way.

Re Wood.—A solicitor having delivered a bill of costs cannot withdraw it from taxation, on its being challenged, and substitute another for it, and this even though the bill delivered is incomplete.

INDEX.

A.

Abatement, adverse possession by, 94.

Absolute assignment, choses in action, 210.

Absolute bills of sale, 299.

Abstract of title,
abstract, goodness of, 82—102.
appointments under powers, 91.
assignments, 89.
bankruptcy, 101.
bargains and sales, 89.
confirmation of deed, 87.
copyhold assurances, 101.
curtesy, 100.
deed, confirmation of, 87.
deeds, attestation of, evidence of, 109—115.
deeds, production of, 136.
defeasances, 89.
delivery of, 41, 46, 78.
descent, 98.
disclaimers, 89.
dower, 99.
escheat, 99.
evidence by which title proved, 102—139.
evidence of execution of abstracted deeds, &c., 109—115.
evidence of matters of fact, 115—123.
evidence of proof of proceedings in Courts, 123.
general requisitions and observations, 124—131.
as to notice, 131—135.
proof, strict, how far right of, precluded, 103—109.
production of deeds, 136—139.
waiver of objections to the title, 135.
exchanges, 84.
expense of, 80.
feoffments, 83.
fines and recoveries, 93.
forfeiture, 97.

G.

Abstract of title—*continued.*
generally, 78—81.
gifts, 84.
goodness or otherwise of, 82—102.
grants, 84, 91.
grants, goodness of, affecting, 82.
improvement loans, 129.
incumbrances generally, 130.
leases, 84, 90, 129.
marriage settlements, 129.
mortgages, abstract of, 80.
notice, as to, generally, 131.
partitions, 86.
"perfect," 41.
perusal of, by solicitor, 81.
proof of, 102—139.
purchaser's right to, 81.
releases, 87, 90, 91.
settlements, 129.
settlements, marriage, 129.
surrendered leases, 129.
surrenders, 88.
title by occupancy, 94.
title, evidence by which proved, 102—139.
verification of, 82—139.
evidence of execution, attestation, &c., of deeds abstracted, 109—115.
law, evidence of matters of fact, 115—123.
how far general right to call for strict proof precluded, 103—109.
points of, affecting goodness of abstract, 82—102.
points of, relating to evidence by which title proved, 102.
proceedings in Courts of law, 123.
requisitions and observations, general, 124—135.
waiver of objections to, 135.

Acceptance of offer constitutes contract, 63.

Accounts,
mortgagee in possession, 287—289.
partnership, 544.

Accumulation,
income, clause for, in settlements, 403, 436.
in wills, 524.

Acknowledged deed,
manner of taking, 195.
necessary, 8, 195.
proof of, 112, 122.
rules as to, 197.
searches for, 152.
unnecessary, 6, 7.

Acknowledgment,
claims to prevent statute running, 74.
deeds retained, 185.
married women, 6, 7, 122, 195.
signature of wills, 537.

Action,
damages, 71.
specific performance, 71—75.

Acts of Parliament,
as conveyances, 93.
proof of, 112.

Actual
delivery of deed, 190.
notice, 131.
waiver, 369.

Ademption of legacies, 504.

Administrators,
compounding of claims by, 414, 415.
convicts, 11.
leases by, 329.
sale by, &c., 16, 197.

Admittance, copyholds, 98, 203.

Advancement
clause, settlements of personalty, 404.
wills, 519.

Adverse possession, 94, 95.
abatement, 94.
deforcement, 95.
discontinuance, 95.
disseisin, 94.
intrusion, 94.

Advertisement of sale, 26.

Advowsons, 220, 221.

Affidavit, registration bill of sale, 311.

Affirmative covenants, 178, 182.

After-acquired property,
bill of sale of, 297.
settlement of, 394—396.

Agents,
leases by, 328.
notice to, 132.
purchase by, 19.
sales by, 19.

Agreement,
lease, for, effect of, 335.
voluntary settlements, 477—479.
And see Contract.

Agricultural
fixtures, removal of, 377.
Holdings Act, 1883..376.

Alienations, conditions in restraint of, 514—516.

Aliens, conveyances to and by, 10.

All estate clause, 173.

Allotments and Cottage Gardens Compensation Act, 379.

Alluvion, title by, 95.

Alterations in deeds, requisitions as to, 110.

"And" sometimes construed "or" in wills, 496.

Animals, when privileged from distress, 349.

Annual rents, accounting with, 288.

Annuitant, rights of, 514.

Annuities,
conditions as to, in wills, 514.
grant of, 216.
payment of, by executor, 507.
provision for, in settlement, 396.
registration of, 150, 202.
requisitions as to, 125.
successors' interest regarded as, 120.
wills, condition as to, in, 514.

Ante-nuptial settlements, when impeachable, 471.

Anterior title,
purchaser's rights as to, 46.
requisitions as to, 104, 105.
rights of purchaser with regard to, 46.

Apparent possession, Bills of Sale Act, under, 316.

Application of purchase-money, 192.

Appointment,
executors, 499.
guardians by will, 532.
new trustees, 419.
protectors of settlements, 564.
trustees by court, 420, 421.
trustees for purposes of Settled Land Act, 447—454.

Appointments under powers, 91, 567—572.
application of perpetuity rule to, 568.
defective, 572.
excessive, 573.
fraudulent, 573.
illusory, 572.
release of, 574.
revocation of, 568.
settlements of personalty, 402.
succession duty on, 117.
wills, 520, 527, 528.

Apportionment of conditions, &c., on severance of reversion, 343.

Appurtenances, 173.

Arbitrary fines, 204.

Arbitration,
partners, between, 545.
submission of matters to, by trustees, &c., 415.

Arrears,
annuity, 151.
interest, 240—242.
rent, 346—351.
rent-charge, 216.

Articles of partnership,
object of, 539.
usual provisions of, 539—546.

Assignee of lease, liability on covenants, 209, 343.

Assignment, 89.
annuities, 216.
assignee, position of, after, 208.
choses in action, 210—214.
copyholds, 203.
copyright, 219.
covenant against, 359.
goodwill, 215.
leaseholds, 208—210.
patents, 218.
policy of assurance, 214.
when mortgage of leaseholds should be by, 268.

Assurances, Fines and Recoveries Act, under, 93.

Attestation,
bills of sale, 304.
deeds, 191.
proof of, 122.
wills, 537.

Attested copies, requisitions as to, 112.

Attorney,
admittance to copyholds by, 98, 204.
powers of, 36, 111.

Attornment clause, use of, in mortgages, 263—266.

Auction,
conditions relating to, 38—59.
proceedings at, 57.
puffers at, 57.
varying conditions of sale at, 59.

Awards, proof of, 112.

B.

Banker, failure of, liability of trustee for, 413.

Bankruptcy,
bill of sale, effect of, on, 318.
convict, 11.
gifts over on, in settlements, 401.
mortgagor, effect on underlease, 269.
proceedings, searches for, 149.
how proved, 123.
purchaser, 68.
settlements, gifts over on, 401.
settlements, voluntary, 476.
vendor, 68.

Bankruptcy Act, as to voluntary settlements, 476.

Bare trustee,
married woman as, 8.
meaning of, 20.

Bargains and Sales, 89.
inrolments of, 90.
of copyholds, 101.
proof of, 114.

Barring,
dower, 100.
entails, 123, 561—566.

Base fee, tenant in, 440, 563.

Bedford Level, searches in registry, 147.

Beneficial owner, conveyance as, 180.

Beneficiaries under will, covenants by, 161.

Bid, vendor, right to, 38, 57.

Biddings,
conditions as to, 58.
retractation of, 38.

Bills of Sale, 291—322.
apparent possession, what is, 316.
attestation, 304.
bankruptcy, effect of, 318.
cases, table of, 306.
charges for, 322.
chattels, after-acquired, 297.
chattels, removal of, 303.
consideration, 305, 309.
construction of, 292.
crops, 298.

Bills of sale—*continued.*
fixtures, 296—298.
form of. 321.
instruments within the acts, 292.
property future acquired, 297.
register, omission to, 315.
registration, fees on, 322.
registration of, 202, 304, 311—315.
requirements, 305.
re-registration, 315.
fees on, 322.
risks attending, 320.
sale, restraining, 303.
satisfaction, entry of, 320.
searches, 319.
seizure under, 302.
stamps on, 322.
trade machinery, 296.
what instruments not within the acts, 294.

Bills of Sale Act, 1878,
provisions of, 299—301.
sect. 6, as to attornments in mortgages, 263.

Bills of Sale Act, 1882, as to contents, &c. of bills of sale to secure money, 301—308.

Births, how proved, 116.

Board of Trade, certificate of, as to bankruptcy proceedings, 124.

Bonds, to resign a living, 221.

Bonus, settled life policy, 397.

Breach,
of contract, remedies for, 70—75.
of covenants, 181, 355, 356.

British subjects, wills by, when made abroad, 535.

Broker, liability of trustee for act of, 413.

Building leases, tenant for life can make, 452.

Building societies, reconveyance of mortgaged property by, 284.

Buildings, contract for sale of, 62.

Business, meaning of, 357.

By purchase, meaning of, 436.

C.

Cairns' Act, provisions of, 72.

Capital money,
application of, for improvements, 460.
application of, under sect. 63..466.
investments for, &c., 460—464.
to whom paid, 462.

Caveat emptor, applies to sales of land, 131.

Caveats under Yorkshire Registry Act, 142—143.

Central Office, searches in, 153.

Certificates,
Board of Trade, 124.
redemption of land tax or tithe, 54.
result of search, 153.

Cesser of term, proviso for, 425.

Cestui que trust, sale by, to trustee, 20.

Cestui que vie, 20, 94.

Charges,
improvement loans, 129.
what fall within covenant to pay rates, 351. *See* Legal Charges.

Charitable,
purpose, conveyance of lands for, 201.
trustees, conveyance to, 12.

Charities,
conveyances to, 12.
gifts to, 12.
sales to, 15.
succession duty by, 119.

Chattels,
distress upon, 349.
pledge of, 250.
removal of, under bill of sale, 303.
settled, sale of, by tenant for life, 446.
strict settlement of, 435.

Child, sale to parent by, 18.

Child-bearing, presumption as to, 109.

Children,
gifts to, by will, construction of, 485—488.
illegitimate, 485.
legacies to, 505.
provisions for, in wills, 519—524.
support of, by mother, 392.
trusts for, in settlements of personalty, 402.
voluntary settlements on, 471.

Chirographs, proof of, 113.

Choses in action, assignment of, 210.

Churchwardens, conveyances to, 12.

Class, gifts by will to children as a, 486.

Clauses Act, Lands, 21, 172.

Client,
notice to solicitor affects, 132.
sale by, to solicitor, 19.

Clover, contract for sale of growing, 61.

Commissioner, duties of, when taking acknowledgment of married woman, 195.

Commissions, to secure punctual payments, 242.

Committee of lunatic, conveyances by, &c., 3.

Common law dower, 99.

Commons, right to, by prescription, 95.

Company,
bill of sale by, 316.
conveyances to, 12, 172.

Compensation,
conditions as to, 48—50.
copyholds, enfranchisement of, 205.
improvements, for, 379.
Lands Clauses Act, under, 21.
misdescription, for, 28—30.

Compensation Act, 379.

Completion of purchase, 190.

Complex tenant for life, meaning of, 439, 440.

Compounding,
clause for, in settlement, 414, 415.
interest in mortgages, 242.

Compulsory enfranchisement, 206.

Concealment of incumbrances, 248.

Concise conveyances, 93.

Concurrence, persons joined in conveyance to give, 158—160.

Conditions,
apportionment of, 343.
leases, re-entry in, 363—369.
legacies given upon, 512—517.
not to dispute will, 517.

Conditions of sale, 32.
abstract, requisitions, &c., as to, 32, 41, 46.
auction, as to, 38.
biddings, as to, 58.
classification of, 38.
compensation for errors, 48.
contract, rescission of, 43.
copyholds, 34, 51.
deeds, executed under powers, 36.
deeds, production of, 47.
deposit, 39.
estate, outstanding, of, 34.
exchanged lands, 52.
identity, 35, 47.
inclosed lands, 51.
interest, 40, 44.
lease, as to, 35, 52, 56.
objects of, 32, 37.

Conditions of sale—*continued.*
possession, 45.
relating to compensation, 48.
relating to property sold, and identity, 35, 47.
requisitions, 41.
rules to observe in drawing, 36.
settlement of disputes as to, 155.
special conditions, 51—53.
absence of receipt clause, 54.
Crown, grants by, 52.
deeds executed under powers, 54.
dower difficulties, 55.
irredeemable incumbrances, 56.
lands inclosed, 51.
lands exchanged, 52.
leaseholds, 52.
legal estate outstanding, 54.
lost certificates of land tax, &c., 54.
necessary by reason of title, 53.
puffer, employment of, 57.
rent, apportionment of, 57.
root of title a will, 53.
sale, variation of, at, 58.
unstamped documents, 55.
variation of, at sale, 58.
vendor, right of, to bid, 56.
voluntary deeds, 55.
title, length of, 32.
title registered, 51.
trustees, sales by, 37.
variation of, at sale, 58. *And see* Requisitions.

Conduct of sale in foreclosure and redemption actions, 250.

Confirmations, 87.

Congregation, sale by member of, to parson, 18.

Consent,
parties joined to give, 159.
protector's, to bar entail, 564.

Consequential damages, recoverable by vendor, but not by purchaser, 71.

Consideration,
bill of sale, 301—309.
deeds, for, 166—170.
in leases, 336.
receipt for, condition as to, 54.
receipt for, in or on deed, evidence of payment, 107.

Consolidation of mortgages, 236, 237.

Construction of wills, 481—497.
general rules, 482—484.
particular phrases, 484—497.

Constructive notice, 131—135.

Contingent legacies, 508—512.

Contracts,
breach of, remedies for, 70—77.
disclaimer of, in bankruptcy, 68.
effect of, on parties, 66.
infants', 5.
lease, for, specific performance of, 72.
letters as, 63.
married women's, 6, 389.
part performance of, 64—66.
rescission of, condition as to, 43.
sale and purchase, 60.
private, 60.
preparation of, 60.
signing of, at sale by auction, 40.
stamps on, 76, 225.
tenant for life's, under Settled Land Act, 451.
valid, requisites for, 62.

Conversion,
executor's duties as to wasting property, 524—526.
Lands Clauses Act, under, 23.
leaseholds into freeholds, 222.

Conveyances,
acts of parliament, private, 93.
aliens, 10.
copyholds, 203.
corporations, 11.
different kinds of, 82.
appointments under powers, 91.
assignments, 89.
assurances under Fines and Recoveries Act, 93.
bankruptcy, 101.
bargains and sales, 89.
benefit, for, of persons not parties, 163.
concise, 93.
confirmations, 87.
copyhold assurances, 101.
covenants to stand seised, 89.
curtesy, 100.
defeasances, 89.
descent, 98.
devise, 93.
disclaimers, 89.
dower, 99.
escheat, 99.
exchanges, 84.
feoffments, 83.
fines and recoveries, 93.
forfeiture, 97.
gifts, 84.
grants, 84.
leases, 84, 90.
leases and releases, 90.
occupancy, 94.
adverse possession, 94.
alluvion, 95.
dereliction, 95.
prescription, 95.

Conveyances—*continued.*
different kinds of—*continued.*
parties to whom made, 162.
partitions, 86.
private acts of parliament, 93.
releases, 87, 90.
statutory grants, 91.
statutory release, 91.
surrenders, 88.
title by occupancy, 94.
execution of, 190.
felons', 10.
infants', 5.
lunatics', 3.
married woman, 6.
preparation of, 157—189.
special formalities, 195.
stamps on, 224—226.
tender of, 136.
traitors', 10.
trustees', 16.

Conveyancing Act, 1881,
sect. 3, as to expenses connected with documents not in vendor's possession, 138, 139.
as to power forming part of anterior title, 104.
as to receipt for rent, 53.
leases, as to grant and sales of, 106.
open contracts, 32.
sect. 4, on death of vendor, personal representative can convey, 69.
sect. 5, as to discharging incumbrances, 56, 198.
sect. 6, as to general words, &c., 172, 173.
sect. 7, as to implied covenants, 173, 179—181, 205, 251, 272.
sect. 8, as to execution of deed in purchaser's presence, 191.
sect. 9, as to acknowledgment and undertaking as to deeds retained, 185.
sects. 10—12, as to assignment of reversion on leases, 176, 342.
sect. 13, as to grants of underleases, 106.
sect. 14, as to forfeiture of leases, 97, 367.
sect. 15, as to transfer of mortgages, 246.
sect. 16, as to mortgagor's right to title deeds, 137.
sect. 17 abolishes consolidation, 237.
sect. 18, as to leasing mortgaged property, 261—263.
sect. 19, as to cutting timber, 260.
as to insurance of mortgaged property, 252.
sects. 19—22, and 67, as to mortgagee's power of sale, 254—258.

Conveyancing Act, 1881—*continued.*
sects. 19, 24, as to appointment of receivers, 258.
sect. 25, as to sales in mortgage suits, 250.
sects. 26—29, as to statutory mortgages, &c., 271—273.
sect. 30, as to devolution of mortgaged estates, 128, 245, 281.
sects. 31—34 (now repealed), as to appointment and retirement of trustees, 417—422.
sects. 35, 36 (now repealed), as to trustee's receipts, 192—194, 414.
sect. 37 (now repealed), as to executors, &c., compounding claims, 415.
sect. 41, as to infant's lands, 325.
sect. 42, as to management of infant's lands, 436.
sect. 43, as to maintenance, &c., of infant cestui que trust, 403, 405, 506.
sect. 44, as to rentcharges, 216, 430.
sect. 46, as to executing deed under power, 111, 325.
sect. 47, as to acts done under power without notice of revocation, 111.
sect. 49, as to word "grant," 169, 170.
sect. 51, as to words of limitation, 170.
sect. 52, as to release of powers, 574, 575.
sects. 54, 55, as to receipts, 55, 121.
sect. 56, as to authority to receive purchase-money, 192.
sects. 58—60, and 64, as to construction of covenants, 176, 177.
sect. 60, as to covenants with two or more, 178, 245.
sect. 61, as to joint account clause in mortgages, 243, 244.
sect. 63, as to grant of easements, 173, 221.
sect. 65, as to conversion of leaseholds, 222—224.

Conveyancing Act, 1882,
sect. 3, as to notice, 134.
sect. 5 (now repealed), as to appointment of separate sets of trustees, 422.
sect. 6, as to disclaimer of powers, 559.
sect. 7, as to acknowledged deeds, 8, 195.
sects. 8, 9, as to irrevocable powers, 111.
sect. 10, as to effect of words "die without issue," 529.
sect. 11, as to conversion of leaseholds, 222—224.
sect. 12, as to transfer of mortgages, 246.

Conveyancing Act, 1892..97, 268, 335, 359, 367.

Conveyancing costs, 576—592.

Conveying parties, 157—162.

Convict, property of, 10, 11.

Co-owners,
covenants by, on sale, 181.
sale by, &c., under Settled Land Act, 409.

Coparceners, partitions by, 86.

Copyhold Act, 1887..129, 203—208, 245, 281.

Copyhold Acts, outline of, 203—208.

Copyhold assurances, 101.
bargains and sales, 102.
customary recoveries, 102.
grants, voluntary, 101.
proof of, 114.
stamps on, 225.
surrenders, 102.
voluntary grants, 101.

Copyhold customs, evidence as to, 121.

Copyholders, leases by, 327.

Copyholds,
admittance to, 98, 204.
attorney, admittance by, 98, 204.
conveyance of, 203—208, 450.
devise of, in trust for sale, 204.
enfranchised, conditions as to, 34, 51.
enfranchisement of, 205—208.
entails in, 565.
fines, 204.
forfeiture of, 97.
licences to lease under Settled Land Act, 455.
mortgage of, 267, 279.
proof as to, 101.
purchase of, 16.
sale of, by executors, 526.
title, covenants for, 205.
transfer of mortgages, 279.
vesting of, in new trustees, 421.

Copyright, assignment of, 219.

Corporations,
conveyance of lands to and by, 11—16.
leases by and to, 328.
mortgages to, 16.
Mortmain Acts, 13.

Costs,
bill of sale, 322.
consolidation of, in foreclosure actions, 237.
conveyances, 583, 584.
leases, 385, 583.
mortgages, 275, 580.
purchase deeds, 226, 580.

Costs—*continued.*
sale under Lands Clauses Act, 23.
sales, 580.
settlements, 226, 227, 480, 585.
solicitor's, in conveyancing business, 576, 592.
wills, 585.
And see Legal Charges.
Cottage Gardens Compensation Act, 379.
Cottagers, compensation for improvements, 379.
Counter-notice, by tenant, under Agricultural Holdings Act, 377.
Court,
proceedings in, how proved, 123.
rolls, searches in, 151.
Cousins, gifts to, by will, 489.
Covenantee, heirs, &c. of, need not be named, 177.
Covenantor, heirs of, need not be named, 177.
Covenants,
as affected by Conveyancing Act, 176.
breach of, for title, 181.
breach of, may cause forfeiture of lease, 97.
evidence of performance on sale of lease, 53.
goodwill, assignment of, 215.
heirs bound by, 177.
implied, 175.
implied, in leases, 339.
insure, to, 355.
land, running with, 183.
lessees, 339.
lessors in leases, 361.
marriage settlements, 400.
mortgages of life policies, 270.
mortgagor's, 251.
mortgagor's to repay, 240.
not to assign, 359.
parties, joining of, for, 161.
patents, assignment of, 219.
personal, 182.
persons joined in conveyance to give, 161.
policy, assignment of, 214.
positive, by purchaser, 185.
produce deeds, &c., 35, 185.
property, after-acquired, to settle, 394.
purchaser's, 175, 183.
quiet enjoyment, for, 181.
rent, to pay, 347—351.
repair, 340.
repayment in mortgages, 240.
restrictive and affirmative in conveyances, 183.
restrictive, in leases, 341, 342, 344, 356.
Covenants—*continued.*
running with the land, 183, 185, 222, 344.
sale of goodwill, 215.
settle after-acquired property, 394.
stand seised, 89.
statutory provisions, as to, 176.
taxes, to pay, &c., 340, 351, 352.
title, for, 175—182.
usual, 345.
unusual, 345.
vendor's, 175.
what are "usual," 345.
what are "not usual," 345.
Creditors,
conveyances to defeat, 475.
gifts to, by will, 517.
Crops,
bill of sale of, 298.
compensation for, 379.
mortgagor's right to, 287.
tenant's right to, 375.
Cross-remainders, strict settlements, 434.
Crown,
covenants by, on sale, 181.
debts, 148.
grants, proof of, 113.
land granted by, condition as to, 52.
rights of, under law of alluvion, &c., 95.
Cuicunque aliquid conceditur, conceditur etiam et id sine quo res ipsa non esse potuit, 173.
Cujus est solum, ejus est usque ad cœlum, 47.
Curtesy,
estate by, 100.
tenant by, within Settled Land Act, 441.
Customary recovery, copyholds, 102.
Customs Act, 1888,
as to succession duty, 118.
stamps, as to, 55.
Customs Act, 1889, succession duty, as to, 121.
Customs of copyholds, 97, 121.

D.

Damages,
breach of contract relating to land, for, 71.
specific performance, in lieu of, 71.
Date,
deeds, 157.
wills, 497.

Daughters, appointment to, with restraint on anticipation, 430.
cross remainders, in favour of, 434.

Death,
dispositions dependent on, liable to succession duty, 118.
landlord, of, effect on distress, 350.
mortgagee, of, 280.
partner, of, 544.
presumption as to, 109.
proof of, 116.
purchaser, of, 70.
vendor, of, 69.

Debentures, when not bills of sale, 294.

Debtors, gifts to, by will, 517.

Debts,
legacies in satisfaction of, 505.
legacies, satisfaction of, by, 517.
will, charge of realty by, 500.
will, direction to pay, in, 500.

Decisions,
Bills of Sale Acts, under, 306—308.
Solicitors' Remuneration Act and Order, under, 587—592.

Declaration,
trustee wishing to retire, 420.
trustees, method of vesting property in new, 421.
trusts, of, 477.

Decrease of trustees, on appointment of new, 418.

Deed-poll, under Lands Clauses Act, 22.

Deeds,
acknowledgment and undertaking as to, 181, 183.
arrangement, of, search for, 152.
attestation of, 191.
consideration, the, 166—170.
covenants in, 175.
date of, 157.
delivery of, 190.
disclaimer of, 558—560.
due execution, &c., presumption of, 109.
execution of, 190.
exceptions in, 173.
habendum, the, 174.
operative words in, 169, 170.
parcels, the, 170.
parties to, 157—162.
production of, 32, 136.
purchase, form and contents of, 157.
registration of, purchaser should see to, 110.
reservations in, 173.
unstamped, conditions as to, 55.
voluntary, conditions as to, 55.

Deeds—*continued.*
voluntary, requisitions as to, 114.
words, general, in, 172.
words, meaning of, in, 170.
And see Title Deeds.

Defeasances, 89.

Defective leases, under powers, 330.

Defects in title, conditions as to, 46.

Defences, specific performance, 72.

Deforcement, adverse possession under, 95.

Delegation by trustee, 192.

Delivery,
abstract, of, 41.
deed, of, 190.

Demand, money under bill of sale must not be repayable on, 305.

Demesnes, sale or lease of, under Settled Land Act, 448.

Demise, implies covenant, 176, 339.

Demonstrative legacies, 502.

Deposit,
conditions of sale as to, 39.
forfeiture of, 50.
title deeds, of, 273.

Dereliction, 95.

Descent, 98.

Description,
goods in bill of sale, 301, 302.
premises in conveyance, 170.

Determinable charges, succession duty as to, 118.

Devise,
conveyance as a, 93.
general, what it includes, 527.
limitation, without, 528.
title beginning with, 53.
vested or contingent, whether, 508—512.

Die unmarried,
settlements, meaning of, in, 406.
will, meaning of, in, 496.

Die without ever having been married, meaning of, in settlements, 406.

Die without issue, meaning of, 529.

Disabilities,
copyholds, in connection with admittance to, 101.
infants, sales by, 3.
legal, 1.
married women, 6.

Disabilities—*continued.*
of copyholds, in connection with enfranchisement, 206.
persons non compotes mentis, 2.
redemption actions, no extra period allowed for, in, 248.
Settled Estates Act, provisions of, as to, 470.
title by prescription, effect of, as to, 95, 96.
vendor under, 198.

Discharge of incumbrances under sect. 5 of the Conveyancing Act, 198.

Disclaimer,
bankruptcy, of contract in, 68.
deeds of, 89, 558—560.
powers of, 574.

Disentailing assurances, 561—566.
enrolment of, 202, 565.
proof of, 113.
protector, consent of, 564.
searches for, 152.

Disputes, vendor and purchaser, summary method of settling between, 57.

Disseisin, adverse possession under, 94.

Dissolution of partnership, 553—558.

Distress,
agricultural holdings, 378.
animals, as to, 349.
chattels privileged, 349, 378.
death of landlord, 350.
entry, how effected, 350.
how levied, 350.
landlord, death of, 350.
landlord's remedy for rent, 347.
lodger's goods, 349.
mortgages, clause of, in, 263.
rent-charges, 217.
rent, remedy for, 347.
time to levy, 350.
what chattels are privileged, 349, 378.
where levied, 349.
within what time levied, 350.

Distringas, 212, 270.

Divorce bars dower, 100.

Doctor, purchase by, 19.

Documents, abstract and production of, under open contract, 32.

Domestic fixtures, removal of, 374.

Domicile, 535.

Double rent, when payable by tenant, 383.

Double yearly value, when payable by tenant, 383.

Doubtful title, condition as to, 57.

Dower,
common law, 99.
conditions of sale as to, 55.
estate in, 99.
requisitions as to, 125.
statutory, 99.
tenant is not within Settled Land Act, 441.
uses to bar, 162.

Dowress, as a conveying party, 159.

Drainage, compensation for, 376.

Dumpor's case, 343, 359.

Duration of lease, 338.

Duties, what fall within covenant to pay taxes, 351.

E.

Earnings, married woman's, 388.

Easements,
grant of, 221.
inquiry as to, 123.
land, when legally appurtenant to, 173.
prescription, right to, by, 96.

Effects, meaning of, in will, 492.

Elegit, writ of, effect on lands, 144.

Emblements, 375.
sale of crops constituting, 61.

Enfranchised copyholds,
conditions as to, 51.
proof as to, 114.
title to, 34.

Enfranchisement,
copyholds, 203—208.
settled estates, 449.

Enrolled deeds, how proved, 112.

Enrolment,
lost deed, 202.
Office, search in, 152.
under charitable conveyances, 201.
under Dwellings for Working Classes Act, 201.
under Fines and Recoveries Act, 205, 565.
under Mortmain Act, 14, 201.

Entail copyholds, bar of, 205.

Entailed estates, proof of bar of, 123. *See* Barring Entails.

Entry,
by grantee, rent-charge, 217.
by landlord, to view state of repairs, 341.

Equitable
estates, liable to curtesy, 100.
dower, 99.
judgments, 144–146.
execution, 146.
mortgages, 80, 273—275, 360.
waste, liability of tenant for life for, 429.

Equitable mortgagee, foreclosure by, 249.

Equity of redemption, 247.
mortgage of, 234.
sale of, covenants by purchaser, 183.

Errors, conditions of sale as to, 36, 47.

Escheat, 99.
not affected by enfranchisement, 207.

Escrow, delivery of deed as, 190.

Essence of contract, condition as to time being, 42.

Estate,
meaning of, in will, 491, 492.
tail. *See* Tail and Barring Entails.

Estoppel, 164.

Evidence,
execution, &c. of deeds abstracted, of, 109.
facts, of, 115.
general requisitions and observations, of, 124.
generally, 102.
how far right to strict proof may be precluded, 103.
identity, of, 47.
proceedings in court of law, of, 123.
recitals are, 165.
title, to prove, as abstracted, 102.

Examination of title with view to sale, 26.

Exceptions and reservations, 173.

Excessive appointments, 573.

Exchanged lands, conditions of sale as to, 52.

Exchanges, 52, 84—86, 446.

Exclusive appointments, 573.

Execution,
bills of sale, 304.
conveyance, 190.
deeds, 110, 190.
delivering lands in, 144.
steps to be taken subsequently to, 199.
wills, 535—538.

Executors,
appointment by, in wills, 499.
assignment of leases by, 197.
business, carrying on, by, 501.
compounding of claims by, 414.
disclaimer by, 559.
duties, as to wasting property, 524—526.
entitled to release, 560.
gifts to, by will, 491.
leases by, 329.
mortgages by, 228.
not now entitled to undisposed-of residue, 534.
sales by, 16, 197, 500, 501.
trade, carrying on, of, 501.
who may be, 499.

Exemptions, succession duty, 119.

Expectant heirs, sales by, 168.

Expenses, connected with deeds not in vendor's possession, 138.

Express
reservations, 174.
waiver of title, 135.

F.

Facts,
negative, proof of, 122, 123.
positive, proof of, 115.

Failure of issue, 123.

Falsa demonstratio, non nocet, 170.

Falsification of pedigrees, 80.

Family, provision for, in will, 518—524.

Farm, meaning of, 171.

Fee simple, passes by will, 530.

Felons, conveyance of lands by, 10.

Felony Act, 1870..10, 11.

Feoffments, 83.
by lunatics, &c., 2.
proof of, 114.

Fiduciary capacity, sales by persons in, 16—21.

Fines,
capital money when taken by tenant for life, 452.
copyholds, 204.

Fines and Recoveries Act,
acknowledgment under, 159.
assurances under, 93. *See* Disentailing Assurances.
outline of, 561—566.

Fines and recoveries, as conveyances, 93.

Fire, destruction of house by, after contract for sale, 67.

Firearms, use of, for killing ground game, 381, 382.

Fixed fines, 204.

Fixtures,
bill of sale, of, 296, 298.
contract to sell, 62.
mortgage of, when a bill of sale, 295.
removal of, 373, 374.

Foot or end, meaning of, 536.

Foreclosure actions, consolidation of securities in, 236, 237.

Foreclosure of mortgages, 249.

Forfeiture,
alienation in mortmain, 97.
breach of covenant, 97.
breach of custom in copyhold, 97.
equity of redemption, 248.
none now in felony, &c., 11.
of leases, 363.
patron neglecting to present, 97.
title by, 97.

Formalities must be complied with in exercising powers, 91, 92, 572.

Forms,
bill of sale, 321.
conveyance, 188.
mortgages, 266—275.
further charge, 266.
reconveyance, 285.
statutory, 273.
transfers, 282, 283.

Frauds,
by search official, 154.
in connection with abstract, 80.

Frauds, Statute of,
auctions, sect. 4, how complied with at, 40.
contracts, what are within, 61.
occupancy, provisions of, as to title by, 94.

Fraudulent
appointments, 573, 574.
concealment by mortgagor, 245.
conveyances, 472—476.

Freeholds,
leaseholds, conversion of, into, 222.

Friendly societies, reconveyance of mortgaged property, &c., 284.

Fruit trees, cottagers' compensation for, 379.

Funds in court, assignment of, 210.

Furnished lodgings, contracts as to, 61, 62.

Furniture, meaning of, in will, 494.

Further advances,
how secured by mortgage, 242.
tacking of, 234.

Further assurance, covenant for, 182.

G.

Game, tenant's right to, 381—383.

Gateway, right of, 171.

Gavelkind lands, conveyance of, 3.

General devise,
passes property under power, 92.
what it includes, 527.

General direction to pay debts, effect of, 500.

General legacies, 502—505.

General occupancy, 94.

General power, passes under general devise, 527.

General requisitions on title, 124—135.

General words,
effect of, 172.
use of, 172.

Gifts, 84.
charities, 517.
debtors, 517.
husband to wife, 391.
requisitions as to, 114.

Gifts over,
life interests in settlements, 400.
wills, construction of, 481—497.

Good right to convey, covenant as to, 181.

Goods, chattels, or effects, meaning of, in will, 494.

Goodwill, assignment of, 215.

Grandchildren,
gifts to, by will, 489.
support of, by mother, under M. W. P. Act, 1882..392.

Grant,
advowsons, 220.
annuities, 202, 216.
easements, 221.
no covenant implied by use of, 176.
not now necessary in conveyance, 169.

Grants, 84, 91.
of annuities, 202, 216.
of copyholds, 101.

Ground Game Act, outline of, 381—383.

Growing crops, 61, 266, 379.

Guardian, purchase by, 18.

Guardians, appointment of, by will, 532.

H.

Habendum,
in leases, 337.
use of, 174.

Habitable repairs, meaning of, 354.

Hard bargains, when set aside, 169.

Hares, provisions of Ground Game Act as to, 381.

Heirlooms, sale of, by tenant for life, 448.

Heirs,
gifts to, by will, 490.
not now necessary to convey fee, 169, 170.
of covenantor, &c., 177.
of the body, not now necessary to create fee tail, 170.

Hiring agreement, when a bill of sale, 292.

Holding over, tenant's penalty for, 383.

Holdings, what are, within the Agricultural Holdings Act, 376.

Hops, contract for sale of growing, 61.

Hotchpot clause,
settlements of personalty, 402.
strict settlements, 431.
wills, 518.

House agents, leases by, 329.

House, meaning of, 171.

Household effects, meaning of, in will, 494.

Household goods, meaning of, in will, 494.

Housing of Working Classes Act, 1885, liability of landlord under, 341.

Howe and Dartmouth rule, 524—526.

Husband,
covenants by, 161.
rights and liabilities of, under M. W. P. Act, 1882..389.
support of, by wife, 391.

I.

Identity,
condition as to, 47.
proof of, 35, 115.

Idiots,
conveyances to and by, 2, 3.
leases by and to, 326.

Illegitimate children, gifts to, by will, 485.

Illusory appointments, 92, 572.

Immediate income, provision for, in settlement, 396.

Immemorial use, 95, 96.

Impeachable for waste, when tenant for life is, 428.

Impeachment for waste, tenant for life usually without, 428.

Imperfect settlements, 477.

Implied,
covenants in conveyances, 175.
covenants in leases, 339.
covenants run with the land, 341.
reservations, 174.
waiver, 369.
waiver of objections to title, 135.

Improper investments, liability of trustees for, 412.

Improvement of Land Acts, 129, 460—462.

Improvements,
by mortgagee, 288.
compensation for, in farm and cottage tenancies, 376—381.
tenant for life's, under Settled Land Act, 456.

Inadequate consideration, 167.

Inclosed lands, conditions as to, 51, 52.

Inclosure Act,
awards under, proof of, 112.
exchanges under, 51, 52, 85.

Income,
accumulation of, 436.
application of, for maintenance, 405.
derived from infants' lands, 436.
of a fund, meaning of, in will, 493.
person entitled to for life, within Settled Land Act, 441.

Inconsistent clauses, wills, 484.

Incorporated charities, conveyances to, 12.

Incorporation of documents relating to sale of land, 63.

Increase of trustees on appointment of new, 418.

Incumbrancers, as conveying parties, 158.

Incumbrances,
clearing off, 198.
concealment of, from abstract, 80.
conditions as to, 56.
general requisitions as to, 130.
method of discharging, for purpose of sale, 198.
redemption of, under sect. 5 of Conveyancing Act, 56.
search for, 140—156. *See* Searches for Incumbrances.
shifting of, by tenant for life, 450.
tacking and consolidation of, 234—238. *See* Mortgages.

Indemnity,
clause for, in settlements, 415.
clause for, in Settled Land Act, 465.
on sale of leases, 183.

Indorsed receipt, 168.

Infant,
exercise of power by, 567.
lands of, deemed settled lands, 441.
tenant for life, exercise of statutory powers, 442.

Infants,
contracts, 5.
conveyances to, 5.
conveying parties as, 158.
leases by and to, 324, 325.
maintenance of, by trustees, 403, 404.
management of lands by trustees, 436.
sales by, 3, 4, 158.
settlements by, 397.
specific performance by, 72.
wills of, 442.

Infants' Guardianship Act, 532.

Infants' Marriage Settlement Act, 397.

Inheritance Act, 98.

Inquiries as to title. *See* Abstract and Conditions of Sale.

Inrolment Act, 90.

Instalments, repayment of mortgage money by, 243.

Insurance,
covenant as to, in leases, 355.
married woman's life, 389.
of mortgaged property, 252.
purchaser's position as to, 67.

Intention, wills construed according to, 482.

Interesse termini, 87, 337.

Interest,
arrears of, 240.
covenant to pay, on mortgages, 240.
deposit on, paid at sale, 40.
in land, what is, 61.
legacies, 505—508.
punctual payment of, how to secure, 242.
purchase-money, on, 44.

Interested persons need not be parties to deed, 161.

Intestacy, proof of, 116, 123.

Intestates' Estates Act, 1884..534.
escheat under, 99.

Intrusion, adverse possession under, 94.

Inventory of goods, when a bill of sale, 292, 301.

Investments,
married women's, 388, 391.
of capital money under Settled Land Act, 460—462.
trustees, 408.
trustees of settlements, 408.

Irredeemable incumbrances, 56.

Issue,
birth of, needed for curtesy, 101.
die without, meaning of, 529.
failure of, evidence as to, 123.
wills, provision for, in, 519—524.

J.

Joint account clause, no longer necessary in mortgages, 243.

Joint tenants,
admittance of, to copyholds, 204.
how far mortgagees are, 243.
purchase from, 137.
succession duty, by, 117.

Jointure, 100.
how secured, 429.

Judgment debts, tacking of, 235.

Judgments, how far affect lands, 144—148.

Judicature Act, 1873,
sect. 25, as to assignment of choses in action, 210.
sect. 25, as to waste, 428.

Judicial separation, no bar to dower, 100.

K.

Kin, next of,
gifts to, by will, 490.

L.

Laches, bars remedy by way of specific performance, 74.

Land,
covenants run with, 344.
limited owners of, sales by, 24.
personalty, how settled as, 393.
Statute of Frauds, what is, within sect. 4 of, 61.
what it includes, 47, 171.

Land charge, what it is, 151.

Land Commissioners,
duties of, as to enfranchisement, 206—208.
position of, as to improvements under Settled Land Act, 458.

Land Registry, searches in, 146, 152.

Land Tax,
loss of certificate of redemption, 54.
proof of redemption of, 117.

Land Transfer Act, 51.

Landlord,
consent of, to assigning lease, 359.
covenants by, 353, 358, 361.
distress, 348.
enter and view, right to, 341.
position of, if tenant holds over, 383.
repair, not liable to, 341.
repairs by, covenant for, 353.
restrictive covenants by, 358.

Lands Charges Act, 1888..151.

Lands Clauses Act,
compensation under, 22.
lands, surplus, 24.
outline of, 21.
promoters' estates vested in, 22.
sales under, 21.
summary procedure under, 21.
treat, notice to, 21.
Trustee Act, application of, 24.

Lapse,
law as to, 531.
portions, 434.
Wills Act, provisions of, as to, 519.
wills, provisions to prevent, in, 519—521.

Lease. *See* Leases.

Lease and release, 90.
proof of, 112.

Leaseholds,
assignment of, 208—210.
conversion of, 222.
covenants in mortgage of, 251.
mortgage of, 268, 270.
strict settlement of, 438.

Leases,
administrators, by, 329.
agents, by, 328.
agreements for, 335.
agricultural holdings, 376.
charges for, 385.
conditions on grant or sale of, 52, 56, 57.
consideration in, 336.
contents of, 336.
contract for sale of, 62.
contract for sale of, specific performance of, 74.
copyholders, by, 327.
corporations, by and to, 328.
covenants, 339—363.
deed necessary, 334.
distress, 348, 378.
emblements, 375.
executors, by, 329.
expiration of parties' rights on sale of, 373.
fixtures, agricultural, 377.
fixtures, removal of tenant's, 373.
form of, 334.
habendum, the, 337.
indemnity to vendor on sale of, 178.
infants, by and to, 324, 325.
insurance, covenant for, 355.
lessor, covenants by, 344, 353, 358, 361—363.
married women, by, 326, 330.
parcels, 170, 337.
parties to, 323.
persons non compos mentis, 326.
powers of, in mortgages, 261.
in strict settlement, 438, 443.
powers under, 330.
preparation of, 336.
recitals in, 336.
reddendum, the, 338.
re-entry, condition for, 363.
re-entry, waiver of right to, 369.
rent, covenant to pay, 346—351.
rent, remedy for, 347.
repairs, covenant for, 340, 353.
requisitions as to, 103—109.
reversioners, by, 327.
rights on expiration of, 373.
solicitors' costs for, 583.
stamps on, 384.
surrender of, 129, 370.
taxes, covenant to pay, 340, 351, 352.
tenant for life can make, under Settled Estates and Land Acts, 331, 452—454, 466—470.

Leases—*continued.*
tenant holding over, 383.
tenant, repairs by, 353.
title, on grant of, 34, 35.
title, on assignment of, 34.
when by deed, 334.

Leasing, powers of, in respect of mortgaged property, 261.

Legacies,
charities, 517.
conditions as to, 512.
contingent, 508.
creditors, 517.
cumulative, 508.
debtors, 517.
disclaimer of, 559.
interest on, 505—508.
payment of, 126.
satisfaction in, 506.
substitutional, 508.
various kinds of, 502—505.
vested and contingent, 508—512.

Legacy Duty Act, 126.

Legacy duty,
special clause suggested by Law Society, 535.
statement in wills as to, 507.

Legal charges,
bills of sale, 322.
conveyances, 583, 584.
leases, 385, 583.
mortgages, 275, 580.
purchase deeds, 226, 580.
sales, 580.
settlements, 226, 227, 480, 585.
wills, 585.

Legal disabilities, list of, 1.

Legal estate,
condition as to, if outstanding, 54.
outstanding, 128.

Legal representatives, gifts to, by will, 490.

Legatee, meaning of, in will, 492.

Legitimacy, proof of, 116.

Length of title, 41, 104.

Lessee,
difference between liability of lessee and assignee, 208.
how far bound by restrictive covenants of lessor, 344.

Lessor,
covenants by, 344, 353, 358, 361—363.
re-entry by, for breach of covenants, 363—367.

Lessors and lessees, 323—385.

Letters, contract by, 63.

Letters of hypothecation,
when not bills of sale, 295, 319.

Licence, in mortmain, 11.

Licences, proof of, 122.

Lien,
of purchaser, 75.
of vendor, 75.

Life estate, mortgage of, 267.

Life interests,
conditions as to, in wills, 515.
settlements of personalty, 401.

Life policies,
assignment of, 214.
mortgage of, 270, 271.
settlement of, 396, 397.

Light, right to, by prescription, 96.

Limitation, words of, not required in will to pass fee, 528.

Limitation, Statutes of,
adverse possession under, 95.
contracts, as to, 73.
land, as to money charged on, 240.
legacies, as to, 126.
mortgages as to redemption of, 248, 249.

Limited owners,
leases by, 331—334.
sale by, 24.
And see Settled Land Acts.

Lis pendens, registration of, 125.

Livery of seisin, 84.
proof of, 116.

Living,
forfeiture for neglect to present, 97.
presentments to, 220.

Loans,
for improving settled estates, 129, 459.
to trustees and executors, 231.

Locke King's Acts, provisions of, as to payment of purchase-money, 70.

Lodgers' goods, privileged from distress, 349.

Lodgers' Goods Protection Act, 1871.. 349.

Lodgings, contracts to let, 61, 62.

Long terms,
conversion of, 222.
trustees cannot advance on, 229.

Lord of manor, rights of, by forfeiture, 97.

Lord St. Leonards' Act,
concealment of incumbrances, &c., 80.
sects. 14—18, as to sale, &c., by executors, 231.

Lost certificates, 54.

Lost deed,
enrolment of, 202.
proof of, 112.
requisitions as to, 112.

Lost documents, conditions as to, 54, 56.

Lunacy Act, 1890..124.
orders, 124.
proceedings, proof of, 124.

Lunatics,
conveyances to and by, 2, 3, 157.
leases by and to, 326.
tenants for life, exercise of statutory powers by, 443.

M.

Maintenance,
clause for, in settlements of personalty, 403—406.
interest on legacies for, 507.

Malins' Act, 1857..214.

Management, powers of trustee, as to, 437.

Manor, meaning of, 171.

Mansion-house, sale or lease of, under Settled Land Act, 448.

Market gardens, Agricultural Holdings Act applies to, 376.

Marriage,
conditions in restraint of, 513.
feme sole partner, 539.
proof of, 116.

Marriage articles, evidence as to, 129.

Marriage settlements, 386.
after-acquired property, 394.
covenant for title, 399.
evidence as to, 129.
infants', 397.
investment clause in, 408.
life policy, 396.
not bills of sale, 294.
objects of, 348.
personal property, 392.
strict, 423.
trustees, vesting property in, 392.
trusts of, 400.
See Settlements.

Married woman,
acknowledged deeds, 8, 112, 122, 195.
anticipation, restraint on, 390.
appointment by, 407.
bankruptcy of, 390.
choses in action of, assignment of, 213.
contracts of, 389.
conveying party, as, 158.
disabilities of, 6.
disclaimer by, 559.
earnings, 388.
exercise of power by, 402, 567.
gifts to, by husband, 391.
insurance of life of, 389.
investments by, 388, 391.
leases by, 326.
obligations cast upon, by M. W. P. Act, 1882..391.
position of, under Acts of 1870 and 1882..387.
protector of settlement, 564.
sales by and to, 6, 158.
separate estate, 388.
settlement, separate property under, 7.
stocks and shares of, 388.
tenant for life, exercise of powers by, 443.
wages, &c., of, 388.

Married women,
as conveying parties, 158.
leases by and to, 326, 330.
sales by, 6, 158.
sales to, 6, 158.

Married Women's Property Act, 1870, outline of, 388.

Married Women's Property Act, 1882.. 388—392.
does not prevent necessity for settlement, 386, 391.
effect of, as to dower, 101.
how it affects covenant to settle after-acquired property, 394.
lands, effect of, as to conveyance of, 77.
outline of, 388.

Matters of fact, proof of, 115—123.

Maxims,
Cuicunque aliquid conceditur, &c., 172.
Cujus est solum, ejus est usque ad cœlum, 47.
Falsa demonstratio non nocet, 170.
Simplex commendatio non obligat, 29.
Vigilantibus non dormientibus subvenit æquitas, 74.

Memorandum, of deposit of title deeds, 274.

Memorials,
of deeds requiring registration, 199—201.
stamps on, 201.

Merger, how far conveyance merges contract, 50.

Messuage, meaning of, 171.

Method of searching, 153—156.

Middlesex,
registry of conveyances of land in, 194.
searches in register, 141.

Middlesex Registry Acts, effect of, 141, 142.

Mines,
contract for sale of, 61.
conveyance of, 172.
do not pass without mention in conveyance of land, 172.
sale of, &c., by tenant for life, 451.
sale of, by trustees, 16.

Mining leases, tenant for life can make under Settled Land Act, 453.

Minister, purchase by, 18.

Misdescription, effect of, 49, 50.

Misrepresentation in particulars of sale, 28—30.

Mode of searching, 153—156.

Money,
entailed, how dealt with, 565.
insurance, application of, 252.
meaning of, in will, 492.

Mortgage,
abstracting, 80.
attornment clause in, 263.
consolidation of, 236.
copyholds, 267, 279.
corporation, to, 16.
covenant for repayment, 240.
deed, preparation of, 239.
disadvantages of second, 2, 233.
equitable, 273—275.
foreclosure, 245, 249.
forms of, 266—275, 282, 283, 285.
future advances, 242.
interest upon, 240—242.
leaseholds, 269.
leases, grant of, 261, 288.
legal charges for, 275, 283, 285.
life estate, 267.
life policies, 270.
mortgagees, repairs by, 287.
accounts of, 288.
improvements by, 288.
mortgagor's title, 238.
mortgagors, powers and duties of, 286.

Mortgage—*continued.*
nature of, 239.
policies, 270.
receiver, appointment of, 258.
remuneration of, 259.
reconveyance of, 284, 285.
redemption of, 245.
repayment of, 240.
reversions, 270.
sale under, 18, 158, 159, 254—258.
scale of solicitors' charges for, 580.
second, 231, 233.
solicitors' charges for, 275, 283, 285.
special cases, form in, 267.
stamps on, 289, 290.
statutory, 271.
statutory form of, 273.
tacking of, 234.
tenant for life under Settled Land Act, 447, 453.
timber, cutting and selling, 260.
title of mortgagor, 238.
transfer, mortgagor's right to compel, 246.
transfers of, 277—283.
trustees' advances on, 228.
trustees, by, 228.
value of security for, 228—238.

Mortgage deeds, 239.
preparation of, 239.
transfers of, 277—283.
See Mortgage.

Mortgage money, repayment of, by instalments, &c., 243.

Mortgaged property,
devise of, 527.
sale of, 254—258.

Mortgagee,
accounting by, 287.
death of, 280.
equitable, 273—275.
foreclosure by, 249.
insurance by, 252.
leases by, 261.
must now transfer if so required, 246.
possession, in, duties, &c. of, 286—289.
powers of, 286—289.
receiver, appointment of, by, 258.
sale by, 158, 159, 254—258.
second, 231, 233.
timber, cutting and selling, 260.

Mortgagees,
accounts of, 288.
how far joint tenants, 243.
improvements by, 288.
mortgagors and, 228.
powers of, 286.
purchases by, 20.
repairs by, 287.
sale by, 18, 158, 159, 254.

Mortgages. *See* Mortgage.

Mortgagor,
action by, 287.
concurrence of, in transfer, 277.
consent by, on sale by mortgagee, 162.
duty of, when in possession, 286—289.
estate of, may be altered by proviso for redemption, 247.
insurance by, 252.
leases by, 261, 288.
right of, to compel transfer, 246.
title deeds, rights as to, 137.
title of, 238.

Mortgagors and mortgagees, 228—290.
bills of sale, 291—322.
form of mortgage in special cases, 266—275.
mortgage deed, 273.
powers and duties of mortgagors and mortgagees in possession, 286—289.
reconveyance of mortgages, 284, 285.
transfers of mortgages, 277—283.
value and nature of proposed security, 228.

Mortmain,
alienation in, causes forfeiture, 97.
licence to hold lands in, 11.

Mortmain Acts,
charities, gifts to, 12.
forfeiture under, 11.
institutions not applicable to, 13.
parks, provision as to, 13.
Places of Worship Sites Act, 12.
provisions of, 11—16.
Working Classes Dwellings Act, 13.

Municipal Corporations,
conveyances to and by, 12.
leases to and by, 328.

Mutuality, required for specific performance, 71, 72.

N.

Naturalization Act, 1870, effect of, 10.

Negative facts, proof of, 122, 123.

Neglect by patron to present, causes forfeiture, 97.

Nephews, gifts to, by will, 488.

New appointment, reservation of power of, 568.

New successions, 119.

New trustees,
appointment of, 417—420.
powers of, on appointment, 419.
retirement of, 420.
vesting property in, 421.

Next of kin, gifts to, by will, 490.

Next presentations, 220, 221.

Nieces, gifts to, by will, 488.

Non-production of deeds, 137—139.

Notice,
annuity, 150.
assignment of chose in action, 210—214.
assignment of policies, 214.
bankruptcy, disclaimer in, 68.
chose in action, assignment of, 211.
complete within reasonable time, 42.
conveyance, how effected, 162.
conveyance, parties to, 162.
disclaimer in bankruptcy, 68.
doctrine of, 131—135, 183.
enfranchise, right to, 206, 207.
judgments, registered and unregistered, 145.
land, registered counties, in, 141—143.
Lands Clauses Act, under, 21.
law of, as to lands in registered county, 141—143.
mortgagee prior to sale, 255.
policy, assignment of, 214.
purchaser, to avoid payment of interest, 44.
quit premises, 372, 377.
quit, under Agricultural Holdings Act, 377.
rent-charge, 150.
right to enfranchise, 206, 207.
second mortgage, 235.
Settled Land Act, under, 447.
tenant's, before removing agricultural fixtures, 377.
treat, to, under Lands Clauses Act, 21.
trustees, to, 212.

Novation, doctrine of, 541.

O.

Objections to title, waiver of, 135, 136.

Observations, general, on title, 124—135.

Occupancy,
adverse possession, 94, 95.
alluvion, 95.
dereliction, 95.
prescription, 95, 96.
title by, 94—96.

Occupation of grantor of bill of sale, 312.

Occupiers, right of, to ground game, 381—383.

Offer, withdrawal of, 64.

Open contract, 32.

Operation of law, surrender of lease by, 371.

Operative
part of deed, how affected by recitals, 164.
words in conveyances, 169.
words in leases, 337.

"Or," sometimes construed "and" in wills, 496.

Order and disposition clause, 214, 318.

Original documents, loss of, condition as to, 55.

Ornamental fixtures, removal of, 374.

"Other," meaning of, in will, 495.

Outlawry, may still cause forfeiture, 10.

Outstanding legal estate,
conditions as to, 54.
getting in of, 34, 128, 129.
presumptions as to, 108.

P.

Parcels in conveyances, 170—172.

Parent,
payment of income of settled property to, 404.
purchase by, 18.

Parks, conveyances for, 13.

Parliament, Acts of,
conveyances, as, 93.
proof of, 112.

Parol variation of written conditions, 57, 58.

Parson, purchase by, 18.

Part performance of contract, 64—66.

Particular phrases, construction of, in wills, 484—497.

Particulars of sale,
misrepresentation in, 28.
preparation of, 26—31.

Parties,
conveyance for benefit of persons not, 163.
conveyance made, to whom, 162, 163.
deeds, 157—162.

Parties conveying, special formalities in certain cases, 195—199.

Partition Acts, partition under, 86.

Partition, settled estates, 446.

Partitions, 86, 87.

Partner,
assignment of share of, 553.
death of, 544.
retirement of, 540.
when expelled, 552.
wrongful act of, 549.

Partners,
admissions by, 550.
conveyance to, 162.
guarantees by, 550.
introduction of new, 550, 552.
liability of, 548.
notice to, 550.
powers of, to bind firm, 543—545, 548.
status and powers of, 543.
who may be, 539.

Partnership,
accounts, taking of, 544.
agreement for, 539.
arbitration, 545.
articles, 539, 545.
assets of, 558.
assignment of share in, 553.
books, 543.
death of one, 544.
deeds, 539.
definition of, 546.
determination of, 541, 552.
dissolution of, 541, 554.
evidence of, 546.
expenses, provision as to, 543.
liabilities of, 548.
losses, 555, 558.
novation, doctrine of, 541, 550.
profits, 543.
relationship of, 550.
retirement of one, 540.
shares, assignment of, 553.
stamps on, 545.
term, length of, 540.

Partnership Act, 1890, outline of, 546—558.

Partnership articles,
object of, 539.
usual provisions of, 539—545.

Past child-bearing, presumption as to, 109.

Patents, assignment of, 218.

Patents assignment, registration of, 219.

Patient, sale by, 19.

Patron, forfeiture of right to present, 97.

Payment of interest on mortgage, how secured, 240.

Payment of purchase-money, 44, 45, 121, 190, 212.

Payment of rent, 346.

Pedigree,
falsification of, 80.
proof of, 116, 117.

Penalties in mortgages to secure punctual payment, 242.

Perfect abstract, delivery of, 78.

Performance, action for specific, 71—75.

Performance, part, doctrine of, 64.

Permissive waste, liability of tenant for, 340, 428.

Perpetuity rule,
application of, to appointments, 568—571.
application of, in wills, 523.

Personal annuities,
grant of, 216.
how secured, 216.
remedies for, 216.

Personal chattels, what are, within the Bills of Sale Acts, 295—299.

Personal property,
settlements of, 392—423.
strict settlement of, 435.

Personal representatives, distress by, 350.

Personalty,
settlement of, 392—423.
settlement of land as, 393.

Persons non compotes mentis,
conveyance by and to, 2, 3.
leases by and to, 326.
will of, 498.

Pin money, how secured, 425, 427.

Places of Worship Sites Act, 12.

Plans at sales, 31.

Plant, bill of sale of, 295—299.

Pledgee, of chattels, remedy of, 250.

Poison, destruction of ground game by, 383.

Policies,
assignment of, 214.
life, mortgage of, 270.
settlement of, 396.

Pool, effect of conveyance of, 171.

Portions,
lapsing of, 434.
strict settlements, how secured in, 430.
when payable, 433.

Positive facts, how proved, 115—123.

Possession,
apparent, doctrine of, under Bills of Sale Acts, 316—318.
taking of, by purchaser, 45, 67, 136.
taking, of goods under bill of sale, 302.

Post-nuptial settlements, 470—479.

Power,
distress in mortgages, 263—266.
property appointed under, by will, 520, 527, 531.
requisitions as to lease granted under, 106.
sale in mortgages, 254—258.
Settled Land Act, conferred by, 446.

Powers,
appointment, settlements of personalty, 402.
appointments under, 91, 92, 567—575.
subject to perpetuity rule, 569.
succession duty, 117.
attorney, of, deeds executed under, 36, 111.
condition as to, 54.
conferred by Settled Land Act, not transferable, 443.
deeds executed under, 36, 111.
different kinds of, 567.
disclaimer of, 559.
infants, exercise of, 4.
leases under, 330.
married woman, exercise of, 8.
new trustee on appointment, 419.
receiver, 258.
release of, 574, 575.
settlements, given to trustees in, 407.

Premises, description of, in conveyances, 170—172.

Premiums, life policy settled, 397.

Preparation of conveyance, 157—189.
wills, 497—535.

Prescription, title by, 95, 96.

Presentation to living, neglect by patron, 97.

Presumption, doctrine of, between vendor and purchaser, 107.

Presumptions, legal, may be rebutted, 483.

Principal, sale by, 19.

Priority
among holders of bills of sale, 315.
between assignees of chose in action, 210.
between mortgagees, 234.

Private Acts of Parliament,
as conveyances, 93.
proof of, 112.

Private contracts for sale, preparation of, 60. *See* Sale and Contract.

Privileged chattels under distress, 349, 378.

Proceedings at an auction, 57—59.

Proceedings in court, proof of, 123, 124.

Production,
deeds, 35, 136—139.
title deeds, expense of, 138, 139.
place of, &c., 138.
to purchaser, 47, 136—139.

Professional charges, solicitor trustee, 416. *See* Conveyancing Costs.

Profits à prendre, when they pass by conveyance of land, 172.

Promoters,
sale to, under Lands Clauses Act, 21.
vesting of lands in, under Lands Clauses Act, 22, 23.

Proof of title, 102—139.

Property,
how vested in trustee of settlement, 392—394.
vesting of, in new trustee, 419.

Protector,
as conveying party, 159.
of settlement, 563.

Proviso,
for redemption in mortgages, 245—251.
re-entry, for, in leases, 363—369.

Public Parks Act, 13, 201.

Puffer, employment of, at auctions, 38, 57.

Puffing, at sales, 26, 27, 38, 39, 57.

Punctual payment of interest, how secured, 242.

Pur autre vie, tenant, 94.

Purchase,
completion of, 190—224.
contract for, 60—77. *See* Sale.
deeds, form and contents of, 157—189.

Purchase-money,
condition as to, 44.
interest on, 44.
Lands Clauses Act, under, 22.
liability of purchaser to application of, 192.
payment of, 121, 191.
in ordinary cases, 191.
purchaser, on death of, 70.
trustee, to, 192.
vendor's solicitor, to, 191.

Purchaser,
bears expenses of producing, &c., deed not in vendor's possession, 138, 139.
bankruptcy of, 68.
contract open, 32, 36.
contract, position after, 66.
conveyance by, to sub-purchaser, 160.
covenants by, 182.
death of, 70.
effect of taking possession by, 67.
from mortgagee, 254.
goodwill, 215, 216.
infants, 3.
interest, liability for, 44.
liability of, to see to application of money, 192.
liability to interest, 44.
lien of, 75.
persons non compotes mentis, 2, 3.
policy, precautions by, 215.
position of, after contract, 66.
position of, under open contract, 32, 36.
possession, taking, by, 67.
possession, when entitled to, 45.
right of, to attest execution, 191.
sub-purchaser, conveyance to, 160

Purchasers,
conveyances to defeat, 464.
position of, when buying from tenant for life, 445.

Purchases,
persons in fiduciary capacity, by, 16—21.
solicitor's charges, scale of, 580.

Q.

Qualified covenants, 179.

Quiet enjoyment,
covenant as to, in conveyances, 178 181.
covenant for, in leases, 361.

Quit,
notice to, 372, 377.

R.

Rabbits, Ground Game Act, provisions of, 381.

Rates, covenant to pay, 351.

Rates and taxes, what may be deducted from rent, 347.

Reading over of deed, 190.

Real Property Amendment Act,
conveyances, effect of, on, 83.
deeds, as to parties to, 163.
"grant" and "give," 176.

Real securities, advances on, 230.

Receipt,
clause, absence of, in deeds, 54.
clause, settlements in, 414.
consideration money, for, 167, 168.
evidence of payment, 106, 107.
mortgagee, of, 257.
rent, production of, on sale, 54.
trustee, of, 192, 193.

Receiver,
appointment of, by mortgagee, 258.
appointment of, for execution purposes, 146.
moneys, application of, by, 259.
powers of, in mortgages, 258.
remuneration of, in mortgages, 259.
when power exercisable, 258.

Recitals, 164—166.
deeds, in, when afford evidence, 104.
estoppel by, 112.
estoppel, law of, 164.
evidence, by, 165.
leases, in, 336.
releases, in, 561.
truth of, between vendor and purchaser, 34.
use of, 164.

Reconveyance,
mortgages, 284.
presumption of, 107, 284.
proviso for, in mortgages, 245—251.

Recoveries,
conveyances, as, 17.
proof of, 113.

Reddendum, in lease, 338.

Redeem, who can, 248.

Redemption,
equity of, 247.
land tax, 117.
proviso for, in mortgages, 245—251.
strictly a proviso for reconveyance, 245.
tithes, 123.

Reduction into possession, wife's chose, what constitutes, 213.

Re-entry,
conditions for, in leases, 363—367.
exercise of right of, 364.
proviso for, 363.
waiver of right of, 369.

Register counties,
registering conveyances of lands in, 199, 200.
searches in, 141, 142.

Registered companies, conveyances to, 12.

Registered titles,
conditions as to, 53.
under Land Transfer Act, 1875..53.

Registration,
annuities, 150, 151, 202, 218.
bills of sale, 202, 304, 311—315.
copyright, 219.
Crown debts, 148, 149.
deeds, 200.
executions, 144—148.
judgments, 144—148.
land charges, 151.
lis pendens, 149, 150.
making good want of, 34.
Middlesex, 141.
patents, 218.
rent-charges, 150, 151, 202, 218.
Yorkshire, 142.

Registration of deeds, requisitions as to, 110.

Registry Acts,
conveyances excepted from, 200.
outline of, 141—143.

Reimbursement, clause for, in settlements, 415.

Relations, gifts to, by will, 489.

Release,
deeds of, 560, 561.
powers, 574, 575.
setting aside of, 561.

Releases, 87, 560, 561.

Relief, under Conveyancing Acts, 367, 368.

Religious bodies, sales to, 15.

Remainderman, purchaser from, does not get title deeds, 137.

Remedies,
breach of contract, 71.
mortgagees, 254, 272.
rent-charge, 427.

Remoter issue, appointments in favour of, under settlements, 402.

Removal, fixtures, 373, 374, 377, 378.
Remuneration,
Acts, decisions under, 587.
receiver appointed by mortgagee, 259.
solicitors, 275, 283, 285, 576—592.
trustees, 415.
Rent,
distress, 348.
how paid, 346.
payment of, by mortgagee, 263, 289.
payment of, under lease, 346.
remedies for, 347.
reservation of, in lease, 345—351.
what is, within Conveyancing Act, 1881, 107, 222.
when due, 346.
whom payable to, 347.
Rent-charges, 216—218.
arrears of, 218.
how granted, 216.
pin-money and jointure may be secured by, 427—429.
registration of, 150, 151, 202, 218.
satisfaction, 127.
statutory remedies for, 216.
Repairs,
covenants as to, in leases, 353.
covenants as to, in mortgages, 253.
implied covenant as to, 340.
mortgagee, by, 287.
tenant for life's position as to, 428.
Reputed ownership, how far bankruptcy law of, applies to bills of sale, 318.
Requisites,
to valid contract to sell land, 62—64.
to valid exchanges, 84.
Requisitions, 102—139.
acknowledged deeds, 112.
Acts, private, 112.
alterations in deeds, 110.
annuities, 125.
attestation of instruments, 122.
attested copies, 112.
attorney, powers of, 110, 111.
awards, 112.
bankruptcy, 124.
bar of estates tail, 123.
bargains and sales, 114.
births, deaths, marriages, 109.
births of children, 109.
chirographs, 113.
conditions as to, time for making, 42.
Conveyancing Acts, protecting powers of, 111.
copies, attested, 112.
copyhold assurances, 112.
Crown grants, 113.
customs in copyholds, 121.
death, 109, 116.
Requisitions—*continued*.
deeds, alteration of, 110.
enrolled, 112.
lost, 112.
disentailing assurances, 113.
disputes as to, settlement of, 155, 156.
dower, 125.
earlier title, 104.
easements, 123.
enfranchised copyholds, 114.
enrolled deeds, 112.
execution of deeds, 109.
fact, matters of, 115.
failure of issue, 123.
feoffments, 114.
for searching, 154.
formal, on title, 124—135.
freedom from tithes, 123.
general requisitions, 124.
annuities, 125.
constructive notice, 130, 131.
dower, 125.
improvement charges, 129.
incumbrances, 130.
legacies, 126.
marriage articles, 129.
marriage settlements, 129.
notice, 131.
outstanding legal estates, 128.
satisfied terms, 127.
surrendered leases, 129.
gifts, 114.
identity, 115.
intestacies, 123.
joint tenants, 117.
land tax, redemption of, 117.
leases, 105.
leases and releases, 112.
legacies, 126.
legal estate, outstanding, 128.
length of title, 104.
licences, 122.
lost deeds, 112.
lunacy, 124.
marriages, 116.
matters of fact, 115.
past child-bearing, 109.
payment of consideration-money, 107, 121.
pedigree, 116, 117.
powers of attorney, 110.
private Acts of Parliament, 112.
proceedings in courts of law, 123.
purchase-money, 107, 121.
recitals, 104, 112.
recoveries, 113.
redemption of land tax, 117.
tithe, 123.
registration of deeds, 110.
seisin, 116.
seisin of testator, 109.
stamps on deeds, 110.

Requisitions—*continued.*
succession duty, 117—120.
tithes, 123.
waiver of requisitions, 135. *See* Waiver.
wills, 113.
woman past child-bearing, 109.

Re-registration,
bills of sale, 315.
Crown debts, 148, 149.
judgments, 145.
lis pendens, 149, 150.

Rescission of contract,
condition as to, 41.
when allowed, 28.

Reservations, 173, 174.

Reserved price at sales by auction, 58.

Re-settlement of settled estates, outline of, 562.

Residence of grantor of bill of sale, 313.

Residuary devise, 503.
what it includes, 499.

Residue,
executor's right to, 534.
meaning of, in will, 495.
trustees, position of, as to, 533.
undisposed of, 533.

Resignation bonds, when simoniacal, 221.

Restraint on anticipation,
how affected by M. W. P. Act, 1882.. 390—392.
still allowed, 402.

Restrictive covenants,
effect of, in conveyances, 177, 178, 183—185.
in leases, 356—359.
lessor, by, how far binds lessee, 344.

Retirement,
partner, 540.
trustees, 420.

Retracting bidding, 38.

Reversion,
covenants run with, 344.
mortgage of, 270.
on lease, severance of, 343.

Reversionary title, production of, on grant or sale of lease, 34.

Reversioners,
leases by, 327.
sales by, 168.

Revocation,
appointments under powers, 568.
clause of, in wills, 497.
power, of, 568.
voluntary settlements, 477.

Rights of way, 96, 222.

Risks of equitable mortgagee, 273—275.

Rolls of manor, searches for, 151.

Root of title, what should be selected as, 79.

Rules,
acknowledged deeds, as to, 197.
searches, as to, 153.
Schedule II. of Solicitors' Remuneration Order, 584.
Solicitors' Remuneration Order, Schedule I., 581.

Running with the land, covenants, 178, 183, 222, 344.

S.

Sale,
conditions of, 32. *See* Conditions of sale.
contracts for, 60.
executor's power of, 500, 501.
fiduciary capacity, persons acting in, 16—21.
foreclosure, in lieu of, of mortgaged property, 250.
guardian, by, 18.
medical man and patient, 19.
mortgagees, power of, 18, 20.
mortgages, power of, in, 254—258.
parent and child, 18.
particulars of, 16.
persons non compotes mentis, by, 2.
Settled Land and Estates Acts, settled estate under, 17, 446—452, 466—469.
solicitor and client, 19.
trustees, power of, 16, 20.
ward, by, 18.

Sale and purchase of lands,
contract for, 60—71.
contract, breach of, 70.
contract, effect of, on position of parties, 66.
bankruptcy of one of parties, 68.
death of one of the parties, 69.
part performance of, 64.
preparation of, 60.
position of parties after contract, 62.
remedies for breach of contract, 70.
lien of the parties, 75.
remedy, in specific performance, 71, 74.
remedy in damages, 71.
time to seek remedy, 73.
stamps on, 76.
valid requisites of, 62.

Sale and purchase of lands—*continued.*
land, interest in, what is, 61.
part performance, acts of, taking case out of statute, 64.
requisites of a valid contract, 62.
what is an interest in land, 61.

Sale of goods seized under bill of sale, 303.

Sale plans must be true, 31.

Sales,
aliens, 10.
charities, 15.
corporations, 11.
infants, 3.
Lands Clauses Consolidation Act, 21.
limited owners, 24.
married women, to and by, 6.
persons in fiduciary capacity, 16—21.
persons non compotes mentis, 2.
religious bodies, 15.
scale of solicitors' charges on, 580.
Settled Land and Estates Acts, under, 446—452, 466—469.
traitors and felons, 10.

Sales by Auction Act, 1867, provisions of, 38, 58.

Satisfaction,
annuities, 125.
bills of sale, 320.
Crown debts, 149.
debts, 506, 517.
legacy by legacy, 508.
mortgage of copyholds, 268.

Satisfied terms, law as to, 127.

Satisfied Terms Act, 284.
practice under, 127.

Schedules and rules, Solicitors' Remuneration Act, 580—585.

Sealing of deeds, 190.

Searches,
bills of sale, 319.
Central Office, 153.
certificate of result of, 153.
court rolls, 151.
incumbrances, for, 140.
local register, 201.
mode of, 153.
mode of searching, 153—156.
special, 151.
acknowledged deeds, 153.
bankruptcy, 152.
bankruptcy proceedings, 152.
deeds of arrangements, 152.
disentailing deeds, 152.
usual, 141.
annuities, 150.
county registers, 141.
Crown debts, 148.

Searches—*continued.*
usual—*continued.*
executions, 144.
judgments, 144.
land charges, 151.
lis pendens, 149.
Middlesex, in, 141.
solicitor, when not answerable for, 154.
Yorkshire, in, 142.

Searching, mode of, 153—156.

Second mortgage, disadvantages of, 231, 233.

Securities for money, meaning of, in will, 493.

Seisin, proof of, 35, 116.

Seisin of testator, presumption as to, 109.

Seizure of goods under bill of sale, 302.

Seizure quousque of copyholds, 98.

Separate property,
conveyance of, 7.
under M. W. P. Act, 1882..387.

Service, notice to quit, 373.
of notices under Conveyancing Act, 256.

Settled estates,
exchange of, or sale of, 446—452, 466—469.
leases of, 331—334, 452—455, 469.

Settled Estates Act, 1877..467—470.
contrasted with Settled Land Act, 470.
leases under, 331—334, 469.

Settled Land, meaning of, 439.

Settled Land Acts, 1882—1890..439.
application of act to settlements of land in trust for sale, 466.
appointment of trustees, 447, 464.
capital money, provisions as to, 458.
cutting timber, provisions as to, 464.
dedication of property for streets, 455.
improvements allowed, 456.
infant's lands, leases of, 325.
enfranchisements under, 206, 449.
exchanges under, 85, 446.
improvements authorized, 456, 460.
leases under, 431—434, 452—455.
licences to lease copyholds, 455.
mortgages under, 448, 455.
outline of, 439, 467.
partitions under, 86, 449.
powers conferred by,
are compulsory, 445.
are cumulative, 446.
are personal, 444.

Settled Land Acts, 1882—1890—*contd.*
provisions as to trustees, 193, 445, 447, 460, 463.
sale of lands by trustees, 17, 467.
sales under, 446—452.
surrender of leases, 454.
tenant for life, who is, 439.

Settlements, 386—480.
after-acquired property, 394.
charges for, 480.
chattels, 435.
imperfect, 478, 479.
income, application of, 437.
infants, 397.
investment clauses in, 408.
life policy, 396.
marriage, object of, 348.
meaning of, in Settled Land Act, 439.
personal property, 392.
scale of solicitors' charges for, 585.
strict, 423.
form of, 424.
object of, 423.
title, covenants for, 399.
trust, clauses in, 407.
trustees, vesting property in, 392.
trusts of, 400.
voluntary, 470—479.

Settlor, conveyance as, 400.

Sewers rate, when payable by tenant, 351.

Share, meaning of, in will, 495.

Shares,
assignment of, 212.
meaning of, in will, 495.
mortgage of, with power of sale, 250.
vesting of, in new trustees, 421.

Sharing profits, provision as to, in partnership, 543.

Signature,
contracts, 62.
deeds, 190.
wills, 537.

Simony,
forfeiture in connection with, 97.
law of, 220.

Simplex commendatio non obligat, 29.

Solicitation of old customers by vendor of goodwill, 215.

Solicitor,
abstracts, duty as to, 81.
attestation of bill of sale by, 304.
authority to receive purchase-money, 191.
charges by, as trustee of settlement, 416.

Solicitor—*continued.*
costs of, for conveyancing business, 576—585.
duty of, as to abstract, 81.
duty of, as to voluntary settlements, 477.
liability of, as to searching, 154.
liability of trustee for act of, 413.
notice to, 131—133.
purchase by, 19.
searching, liability as to, 154.

Solicitor-trustee, 416.

Solicitors Act, 1870..577.

Solicitors' Remuneration Act and Order,
decisions under, 587—592.
miscellaneous provisions, 586, 587.
outline of, 576—579.

Special conditions, 51—59.
copyholds, 51.
deed executed under power, 54.
deed, voluntary, 55.
devise, 53.
disputes, 57.
dower, 55.
incumbrances, 56.
Land Transfer Act, 51.
legal estate outstanding, 54.
rent, apportionment of, 57.
required by nature of the tenure, 51—53.
Crown lands, 52.
enfranchised copyholds, 51.
exchanged lands, 52.
inclosed lands, 51.
leases and underleases, 52, 53.
registered titles, 51.
tenure, on account of, 51—53.
tithe certificate lost, 54.
title or defect thereof, 53—57.
See Conditions; Requisitions.
unstamped documents, 55.

Special conveyances, 203—224.

Special occupancy, 94.

Special power does not pass under general devise, 528.

Special searches, 151—153.

Specific legacies, 502—505.

Specific performance, 58, 71—75.
contract, when granted, 71—75.
not always granted to vendor, 79.
parol variation of contract, 58.

Spencer's case, 178, 184, 344.

Spring traps, Ground Game Act as to, 383.

Stamp Act. *See* Stamps.
documents unstamped, 55.
provisions of, as to consideration, 167.

Stamps, 224.
acknowledgment and undertaking as to deeds, 187.
appointments under powers, 575.
bill of sale, 322.
condition as to, 55, 289.
conveyances, 224.
declaration, on appointment of new trustees, 421.
disclaimers, 561.
disentailing assurances, 566.
leases, 384.
memorials, 201.
mortgages, 289, 290.
partnership articles, 545.
purchaser should see to, 110.
releases, 561.
settlements, 479.

Statute of Frauds. *See* Frauds, Statute of.
sect. 4 not applicable, if contract partly performed, 64.

Statutory declarations as to deaths, &c., 116.

Statutory dower, 99.

Statutory form of bill of sale, 32.

Statutory grant, 91.

Statutory investments, trust funds, 408—411.

Statutory mortgages, 271—273.
form of, 273.
form of reconveyance, 285.
form of transfer of, 282, 283.

Statutory powers,
infant's lands, management of, 441.
mortgagee, of, 254—263.
trustees, of, 407, 412.
See Conveyancing Acts; Settled Land Acts.

Statutory reconveyances, 285.

Statutory release, 91.

Statutory transfers of mortgages, 277—283.
forms of, 282, 283.

Steward of manor, duties of, as to enfranchisement, 206—208.

Stock, assignment of, 212.

Stocks and shares,
married woman may hold, 388.
vesting of, in new trustees, 421.

Stop order, 212.
necessary on mortgage of funds in court, 270.

Streets, dedication by tenant for life, 455.

Strict settlements, 423.
personal property, 435.

Strict uses, 434.

Sub-purchaser,
conveyance by original vendor to, 160.
conveyance by purchaser to, 160.

Subsequent incumbrancers, right of, to compel transfer of mortgage, 234.

Succession duty, 117.

Successor, who is, 117.

Suggestio falsi, ground for setting aside sale, 28.

Suppressio veri, when misrepresentation, 30.

Supreme Court, proceedings, how proved, 123.

Surety, for mortgagor, action against, 241.

Surplus lands under Lands Clauses Act, 23.

Surrenders, 88.
copyholds, 203.
leases, 129, 370.
leases by tenant for life, 452.
leases, evidence as to, 129.

Surveyor, choice of, by trustees, to value proposed security, 229—231.

Survivor, meaning of, in will, 495.

T.

Tacking mortgages, 234.

Taking possession, waiver of objection to title, 136.

Taxes,
implied covenant to pay, 340.
leases, covenant to pay, in, 351.

Tenant,
copyholds, admittance to, 204.
covenant to repair by, 353.
holding over by, 383.
mortgaged property, 261—263.
And see Covenants; Leases.

Tenant at will, leases by, 334.

Tenant by sufferance, 334.

Tenant for life,
admittance of, to copyholds, 204.
concurrence of, on sale, 160.
conveyance by, under Settled Land Act, 450.
conveying party, as, 160.
copyholds, admittance to, 204.
covenant by, 161.
improvements by, 456.
leases by, 469.
liability of, for waste, 428.
sale by, 466.
Settled Land Act, who is, under, 440.
trustee, in exercising powers of Settled Land Act, 446.
waste, liability for, 428.
See Settled Land Acts.

Tenant for years,
holding over by, 383.
leases by, 334.
repairs, liability of, for, 340.
when within Settled Land Act, 440.

Tenant from year to year, liability of, for repairs, 340.

Tenant in fee, with executory gift over, within Settled Land Act, 440.

Tenant in tail,
after possibility of issue, &c., is within Settled Land Act, 440.

Tenant pur autre vie, when within Settled Land Act, 440.

Tenantable repair, meaning of, 354.

Tenant's fixtures, 373, 374, 377, 378.
contract to sell, 62.

Tenants for life, admittance of, to copyholds, 204.

Tenants in common,
admittance to copyholds, 204.
gifts to persons, by will, 488.
how far mortgagees are, 243.
Settled Land Act, under, 440.

Tenants' Compensation Act, 1890..379.

Tender of conveyance, 73, 136.

Tenement, meaning of, 171.

Tenendum, former and present use of, 175.

Term of lease, provisions as to, 337.

Terms of years,
conversion of, 222—224.
object of, in strict settlements, 424, 429.
See Satisfied Terms.

Thellusson Act, 436, 524.

Third mortgages, tacking of, 234.

Timber,
cutting of, by mortgagee, 260.
by tenant for life, 464.

Time,
contract, breach of, to sue for, 73.
when essence of, 42.
requisitions, for, 42.
title, what gives prescriptive, 96.

Tithe, freed of, proof of, 123.

Tithe Act, 1891..340.

Title. *See also* Abstract of Title.
adverse possession, 94.
alluvion, 95.
condition as to, 46.
condition of sale, when doubtful, 57.
covenants for, 178—182.
mortgagor, by, 251.
dereliction, 95.
descent, 98.
disputes on, summary method of settling, 155.
forfeiture, 97.
investigation of, on mortgage, 238.
lands enfranchised, 51.
exchanged, 52.
granted by Crown, 52.
inclosed, 51.
leasehold, 52.
registered, 51.
length of, &c., 32.
loss of certificate of redemption, 54.
occupancy, 94.
prescription, 95.
requisitions as to anterior, 104.
root of, 79.
verification of, 82. *See* Abstract. *And see* Requisitions.

Title deeds,
absence of, how far notice of charge, 132.
mortgagor's rights as to, 137.
place and expense of production, 138.
production of, to purchaser, 47.
recovery of, for purpose of mortgagee's sale, 257.
retaining of, by vendor, 185.
when purchaser does not obtain, 137.

Tortious operation of feoffment, 94. *See* Feoffment.

Trade,
carrying on of, by executor, 500.
meaning of, 357.

Trade buildings, trustees' advances on, 231.

Trade fixtures, removal of, 374.

Trade machinery, bill of sale of, 296.

Traders' settlements, provisions of Settled Land Act, as to, 391.

Traitors, conveyance of lands, 10, 11.

Transfer,
instead of re-conveyance by mortgagee, 245.
mortgages, 275, 277—283.
powers conferred by Settled Land Act, 443.

Transferee of mortgage, 280.

Transfers of bills of sale, 315.

Treason, barred dower, 100.

Treat, notice to, under Lands Clauses Act, 21.

Trust property, devise of, 527.

Trustee,
advances on mortgage, 228.
concurrence of, on sale, 160.
conditions of sale by, 37.
conveyance by, 181.
covenant by, as vendor, 179.
deed, receipt on, 168.
disclaimer by, 559.
how far vendor is, for purchaser, 66.
mine, sale of, 172.
mortgages by, 228.
mortgages to, 231.
payment of money, 111, 192.
position of, on death of cestui que trust, 530.
purchase by, 20.
tenant for life is, when selling, &c. under Settled Land Act, 451, 452.
under disability, conveyance of lands, 198.
vesting orders, 480.

Trustee Act, 1893..37, 111, 168, 192, 228, 408, 412, 414, 415, 418, 420, 480.
application of, under Lands Clauses Act, 24.
And see Trustee and Trustees.

Trustee clauses,
in strict settlements, 435.
settlements of personalty, 407—423.

Trustees,
acknowledgment, &c. as to title deeds, 187.
advances by, on landed security, 228.
appointment of new, 417—420.
appointment of, for purposes of Settled Land Act, 447, 464.
borrow, powers to, 231.
capital money, receipt for, 465.
completion of purchase by, 192.
compounding of claims, &c. by, 414, 415.
concurrence of, to conveyance, 160.
conditions of sale, 37.
conversion of wasting property by, 524—526.

Trustees—*continued.*
copyholds, admittance of, 204.
deeds, undertaking as to, 187.
devise to, passes fee, 528, 529.
disclaimer by, 559.
increase of, 418.
indemnity clause, 415.
investments by, 408.
landed property, advances on, 228.
liability for improper investments, &c., 412.
liability of, 465.
liability of, under Settled Land Act, 465.
mortgages to and by, 228—232.
new, appointment of, 417—420.
new, retirement of, 420.
new, vesting property in, 421.
not entitled to release under seal, 560.
notice to, 131, 212.
one set now sufficient in strict settlements, 424.
policy, settlement of, 396.
powers of borrowing, 231.
property vesting in, 419, 421.
receipts, 414.
reimbursement of expenses by, 415, 416.
release, not entitled to, 560.
retirement of, 420.
sale by, provisions of Settled Land Acts, 17, 463, 467.
sales by, 16—18, 37.
settlement of life policy, 396.
settlements, 407.
solicitor, 416.
statutory powers of, 437.
vesting property in, 392.

Trustees of societies, conveyances to, 15.

Trusts,
outline of a strict settlement, 423.
settlement of personalty, 407.

Two-thirds rule, 229.

U.

Ultimate trusts, settlements of personalty, 406.

Underlease,
conditions on grant or sale of, 52, 53.
mortgage by, 269.

Underlessee, liability of, as to covenants in head lease, 344.

Underletting, covenant against, 359.

Undertaking, for safe custody of deeds, 185.

Undisposed-of residue under will, 533.

Unmarried, meaning of, 406, 407, 496.

Unstamped deeds, condition as to, 55.

Uses,
in strict settlement, 434.
to bar dower, conveyance, 162.

Uses, Statute of, as to jointure and dower, 100.

Usual covenants, what are, in a lease, 345.
what are not, 345.

Usual searches, 141—151. *See* Searches.

V.

Valid contract to sell lands, requisites of, 62—64.

Variation of conditions at sale, 58.

Vendor,
administrator as, 197.
bankruptcy of, 68.
bidding by, 57.
death of, 69.
disability of, 198.
executor as, 197.
expense of producing deeds, as to, 138.
goodwill, position of, 215.
lien of, 75.
married woman as, 195.
obligations of, under open contract, 32—38.
position of, after contract, 66.
remainderman as, 137.
retainer of title deeds by, 137.

Vendor and purchaser, position of, under open contract, 32—38.

Vendor and Purchaser Act, grant and sale of leases, 105—107.

Vendor and Purchaser Act, 1874,
affects open contracts, 32—36.
deeds, recitals in, 104.
sect. 2, as to title deeds, 137.
sect. 4, as to devolution of legal estate, 128, 280.
sect. 8, as to registration of wills of land, 143.
sect. 9, as to settlement of disputes, 57, 155.

Vendor's covenants, 175—182.

Verification of title, 81. *See* Abstract; Requisitions.

Vested legacies, 509.

Vesting
order, when required on sales, 198.
property in new trustees, 419, 421.
property in trustees of a settlement, 392.

Vigilantibus non dormientibus subvenit æquitas, 74.

Virtual delivery of deed, 190.

Voluntary
conveyances, 167, 470—479.
deeds, conditions as to, 55.
requisitions as to, 114.
enfranchisement, copyholds, 205—208.
grants, copyholds, 101.
settlements, 470—479.
settlements, married women's, 390.

W.

Wages, married women's, 388.

Waiver,
objections to title, 67, 135, 136.
right of re-entry, 369, 370.

Ward, sale by, to guardian, 18.

Waste,
by copyholder, 97.
liability of tenant for, 341, 428.

Wasting property, executor's duty as to, 524.

Water, conveyance of, 171.

Ways, right to, 95, 221.

Wife,
equity of redemption of, 247.
usual bequest to, by will, 485.

Wife's property,
trusts in settlement of, 401.
ultimate trust of, in settlements, 406.

Wills, 481—538.
accumulation of income, provisions for, 524.
attestation of, 537.
charging realty with debts, 500.
charities, gifts to, 517.
chattels, meaning of, 494.
children, gifts to, 485—488.
children, illegitimate, 485.
children, provisions for, 519.
conditions in, 512.
as to legacies, 512.
construction of, 481—497.
contents of, 497.
copyholds to be sold should not be devised, 527.

Wills—*continued.*
cousins, gifts to, 489.
creditors, gifts to, 517.
date, 497.
debtors, gifts to, 517.
debts, direction to pay, 500.
devise to trustees passes fee, 530.
die unmarried, meaning of, 496.
die without issue, meaning of, 496, 529.
different kinds of legacies, 502—505.
direction in, to pay debts, 500.
estate, meaning of, 491.
execution of, 535—538.
executors, appointment of, 499.
executors, duties of, wasting property, 524.
executors, gifts to, 491.
furniture, meaning of, 494.
general devise, what it includes, 527.
gifts generally, 517.
gifts over, provisions as to, 520, 522.
gifts, when vested and when contingent, 508—512.
goods, meaning of, 494.
grandchildren, gifts to, 489.
guardians, appointment of, 532.
heirs, gifts to, 490.
Howe and Dartmouth rule, 525.
inconsistent clauses in, 483.
interest, legacy on, 505.
lapse, provisions for, 519.
lapsing of devises and bequests, 531, 532.
legacies, bequest of, 502.
legacy duty, provision as to, 507.
legatee, meaning of, 492.
money, meaning of, 492, 493.
nephews, gifts to, 488.
next of kin, gifts to, 488.
of lands in Yorkshire, registration of, 200.
perpetuity rule must be observed, 523.
points to be regarded when making, 497.
proof of, 113.
provisions for benefit of testator's family, 518—524.
provision for carrying on trade, 501.
registration of, when affecting lands in register county, 141—143.
relations, gifts to, 489.
residue, meaning of, 495.
residue, undisposed of, 533.
revocation of, 497.
Wills—*continued.*
solicitors' charges for, 585.
speak from death, 499.
survivor, meaning of, 495.
tenants in common, gifts to, 488.
title beginning with devise, 53.
wasting property, 524.
who can make, 535.
who can be appointed executors, 499.
wife, bequest to, 485.
words of limitation not required to pass fee, 528.

Wills Act, 1837..481.

Withdrawal,
notice to quit, 373.
offer of, 64.

Without impeachment for waste, tenant for life usually is, 428.

Witnesses,
bills of sale, 304.
deed, 191.
Mortmain Act, under, 14.
when necessary to give instruments validity, 122.

Woman,
dower entitled to, sale by, 159.
sale by, 158.

Working classes, conveyances for, 12.

Worship, places of, conveyances for, 12.

Y.

Yielding and paying clause,
implies covenant, 175.
in lease, 338.

Yorkshire,
no tacking of mortgages in, 235.
registering of conveyance of lands in, 200.

Yorkshire registry, searches in, 142.

Yorkshire Registry Acts, 142, 143, 200.

Younger children,
appointments in favour of, in settlements, 402.
meaning of, 432.
provision for, in strict settlement, 430—437.

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